No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

WASHINGTON SAVANNAH RIVER COMPANY,

Petitioner,

v.

STEPHEN D. HOLLINGSWORTH,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state court may constitutionally assert personal jurisdiction over a non-resident corporation which is a subsidiary of a resident corporation, even though the subsidiary (1) transacts no business in the state; (2) the subsidiary and parent observe corporate formalities; (3) the parent does not dominate or control the subsidiary; (4) the contacts between the parent and subsidiary are nothing more than the type of routine interaction one would normally expect to occur between a parent and subsidiary; and (5) the non-resident corporation lacks the minimum contacts with the forum which would support the exercise of jurisdiction under principles announced in numerous decisions of this Court and in various federal courts of appeals?

PARTIES TO THE PROCEEDING

This matter arose from a lawsuit in the Court of Common Pleas of Allegheny County, Pennsylvania brought by Stephen D. Hollingsworth against Westinghouse Savannah River Company, now called Washington Savannah River Company ("WSRC")* and Westinghouse Electric Corporation ("WEC"). Prior to entry of final judgment, WEC was dismissed as a defendant. The Petitioner in this Court is WSRC, and Respondent is Stephen D. Hollingsworth.

CORPORATE DISCLOSURE STATEMENT

Washington Savannah River Company is an indirect wholly owned subsidiary of Washington Group International, Inc. ("WGI"), a publicly held company whose stock is traded on the NASDAQ exchange. Other than WGI, no publicly held company owns 10 percent or more of the stock of Washington Savannah River Company, and no publicly held company owns 10 percent or more of the stock of WGI.

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* The complaint filed by Hollingsworth incorrectly named WSRC as Westinghouse Savannah River Corporation, although its correct name at the time was Westinghouse Savannah River Company. That error was not corrected until after the final judgment was entered and WSRC filed its notice of appeal with the Pennsylvania Superior Court. Consequently, the Superior Court caption, as well as the caption in the Pennsylvania Supreme Court, continued to name WSRC in this manner. Effective December 8, 2005, WSRC's name was changed to Washington Savannah River Company.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Petitioner, Washington Savannah River Company ("WSRC"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Superior Court of Pennsylvania entered in this proceeding on April 22, 2005.

OPINIONS/ORDERS BELOW

The Court of Common Pleas of Allegheny County, Pennsylvania denied WSRC's preliminary objections challenging personal jurisdiction in an Order dated July 27, 2000 (App. C). That Order is unreported. Final judgment in favor of Hollingsworth and against WSRC was entered on November 26, 2003 by the Court of Common Pleas pursuant to a November 25, 2003 order denying WSRC's motion for post trial relief. (App. B). Following WSRC's appeal, the Court of Common Pleas filed a February 13, 2004 Opinion explaining the basis for its denial of WSRC's challenge to personal jurisdiction. (App. D). That Opinion of the Court of Common Pleas is unreported. The Court of Common Pleas also filed an Opinion on April 29, 2004 (App. E) explaining the basis for its ruling on the merits. That Opinion is unreported.

The Superior Court of Pennsylvania affirmed the judgment entered against WSRC, including the order of the Court of Common Pleas which denied WSRC's challenge to personal jurisdiction, in an Opinion and Judgment entered on April 22, 2005. (App. A). The Superior Court's Opinion is unreported.

The Pennsylvania Supreme Court denied WSRC's Petition for Allowance of Appeal in a May 18, 2006 Order (App. F). To date, the Order is unreported.

STATEMENT OF JURISDICTION

The Opinion and Judgment of the Superior Court of Pennsylvania affirming the final judgment against WSRC was entered on April 22, 2005. WSRC timely filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on May 23, 2005. The Pennsylvania Supreme Court denied the Petition for Allowance of Appeal on May 18, 2006. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The due process clause of the Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const., amend. XIV, §1.

2. The Pennsylvania Long Arm Statute provides in pertinent part as follows:

> **(a) General Rule** – A tribunal of this Commonwealth may exercise personal jurisdiction over a person. . . :
>
> (1) Transacting any business in this Commonwealth. . . .
>
> * * *

> **(b) Exercise of Full Constitutional Power Over Non-Residents** – In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons . . . to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

42 Pa. C.S.A. §5322.

STATEMENT OF THE CASE

A. Procedural History

This action involves a claim by Hollingsworth for benefits under a supplemental pension plan established by WSRC. Hollingsworth began working for WSRC in South Carolina in 1989 when he transferred from a position with WSRC's then-parent corporation, WEC. He worked at WSRC from 1989 to 1996, when he resigned his employment with WSRC and accepted a position at WEC. Subsequently, his position was eliminated at WEC, and he retired. After his retirement, Hollingsworth claimed that he was entitled to receive benefits under a supplemental pension plan which had been established by WSRC in June, 1993 to address a potential pension shortfall for some persons who had transferred from WEC to WSRC.

WSRC denied Hollingsworth's request for supplemental pension benefits on the basis of its position that a condition to receipt of benefits under the supplemental pension plan was that a person must remain at WSRC and be actively employed at WSRC at the time of his retirement,

and that Hollingsworth had forfeited any potential benefits under the supplemental plan when he voluntarily resigned from his employment with WSRC to accept a position at WEC.

Hollingsworth's complaint named both WSRC and WEC as defendants, and asserted claims for breach of contract, fraudulent misrepresentation and promissory estoppel. WSRC initially responded to Hollingsworth's complaint by filing preliminary objections which asserted that the Pennsylvania court lacked personal jurisdiction over WSRC. The preliminary objections filed by WSRC asserted that Pennsylvania's long-arm statute did not authorize the assertion of personal jurisdiction over it or, in the alternative, that the assertion of personal jurisdiction would violate the due process clause of the Fourteenth Amendment. The Trial Court denied WSRC's challenge to personal jurisdiction, finding that WSRC was the "alter ego" of WEC, its parent corporation until March 1999. (App. C and D).

Following discovery, WEC was dismissed as a defendant,[1] and all the common law claims against WSRC were dismissed on the basis of ERISA preemption. However, the Trial Court permitted Hollingsworth to "convert" his breach of contract claim into a claim for benefits under §502(a)(1)(B) of the Employee Retirement Income Security Act, 29 U.S.C. §1132(a)(1)(B). On June 17, 2003, following

[1] Following WSRC's appeal to the Pennsylvania Superior Court, WEC filed a motion to remove its name from the Superior Court's caption and to dismiss it as a party to the appeal, based on Hollingsworth's failure to appeal from the Trial Court's dismissal. That motion was granted by the Superior Court, and WEC has no interest in the instant proceedings in this Court.

a three-day non-jury trial, the Trial Court issued a verdict and memorandum in favor of Hollingsworth. The Court ruled that Mr. Hollingsworth was entitled to receive benefits under the supplemental pension plan, rejecting WSRC's argument that a condition to receipt of benefits under that plan was that a person must have been actively working at WSRC at the time of his retirement. Based on that ruling, the Trial Court awarded benefits to Hollingsworth in the amount of $182,781, including a lump sum award for future benefits even though lump sum payments were not authorized by the supplemental pension plan. Final judgment was ultimately entered against WSRC in the amount of $255,423 following an award of attorneys fees under 29 U.S.C. §1132(g). (*See* App. B and E).

On appeal, the Superior Court affirmed in all respects the decision and judgment of the Trial Court, including the Trial Court's earlier ruling concerning personal jurisdiction. (App. A at pages A-6 to A-14). On May 18, 2006, the Pennsylvania Supreme Court denied WSRC's Petition for Allowance of Appeal which sought discretionary review of the Superior Court's opinion and judgment in favor of Hollingsworth. (App. F).

B. Facts Relevant To Questions Presented

WSRC is a limited liability company organized under the laws of Delaware which is headquartered in Aiken, South Carolina. (Reproduced Record at 106a-109a).[2] WSRC manages the Savannah River Site for the United States Department of Energy ("DOE"). The Savannah

[2] Record citations herein are to the Reproduced Record filed in the Pennsylvania Superior Court.

River Site is a 300 square mile nuclear complex owned by the DOE. WSRC was organized in 1989 as a wholly-owned subsidiary of WEC and entered into a contract with the DOE to manage the Savannah River Site. (Reproduced Record at 106a). WSRC was a subsidiary of WEC (whose name was changed to CBS Corporation) until March, 1999, when Morrison Knudsen Corporation (now WGI) purchased it and a number of other former WEC subsidiaries. (Reproduced Record at 106a-107a).

From the time of its formation in 1989 to the present, WSRC's business has been concentrated in South Carolina, and it has maintained virtually no Pennsylvania contacts. Specifically, WSRC: (1) generates all of its revenues in South Carolina from its contract with the DOE; (2) has no dealings in Pennsylvania from which it earns any revenues; (3) is neither registered nor licensed to do business in Pennsylvania; (4) has no Pennsylvania office; (5) has no employees, representatives, or agents who reside in Pennsylvania; (6) does not maintain bank accounts, corporate records, or file government reports in Pennsylvania; (7) does not pay Pennsylvania taxes; (8) does not advertise for business in or solicit business from Pennsylvania; (9) does not own property or have assets in Pennsylvania; (10) does not ship products into Pennsylvania; (11) is not listed in any Pennsylvania telephone directory; and (12) does not engage in any activities that would create a continuous and substantial connection between itself and Pennsylvania. (Reproduced Record at 106a-111a).

All significant events material to Hollingsworth's claim occurred in South Carolina, including WSRC's employment of Hollingsworth, and its establishment and administration of the supplemental pension plan on which Hollingsworth's claim is based. Specifically, in July, 1989,

after receiving notice that his position at WEC was being eliminated, Hollingsworth inquired about the possibility of assuming a position with WSRC in South Carolina. (Reproduced Record at 132a-136a). All of his discussions with representatives of WSRC, including his hiring interview, occurred at WSRC's headquarters in South Carolina. During Hollingsworth's 1989 interview, he did not ask any questions relating to the supplemental pension or pension shortfall issues, and no WSRC official or employee made any promises or representations regarding those issues. (*Id.* at 134a, 983a). Hollingsworth secured employment with WSRC while in South Carolina, and WSRC subsequently mailed a formal offer letter and an accompanying packet of information to Hollingsworth's Pennsylvania home. None of these communications involved or discussed the supplemental pension plan or potential pension shortfall issues. (*Id.* at 134a, 983a). Hollingsworth accepted WSRC's offer of employment, terminated his employment with WEC, and relocated to South Carolina, where he began working on August 1, 1989. Hollingsworth worked in South Carolina until 1996, when he voluntarily resigned to return to Pennsylvania to accept a position with WEC. (*Id.*)

All aspects of the development, implementation and administration of the supplemental pension plan on which Hollingsworth's claim was based occurred in South Carolina. Specifically, all internal discussions at WSRC concerning the establishment of the supplemental pension plan occurred at WSRC's offices in South Carolina. (Reproduced Record at 1128a-1130a, 1411a). Likewise, all discussions between WSRC and its employees, and between WSRC and representatives of the DOE whose approval was required to establish the supplemental pension plan, occurred in South Carolina. (*Id.*). Finally, all

aspects of the administration of the plan, including communications with employees concerning eligibility for benefits, were initiated by WSRC from its offices in South Carolina. (*Id.* at 1074a-1083a, 1093a-1095a).

C. Decisions Of The Trial Court And Superior Court

As stated *supra*, the Trial Court overruled WSRC's preliminary objections relating to personal jurisdiction, which were based on WSRC's position that it lacked the requisite minimum contacts with Pennsylvania to justify the assertion of personal jurisdiction over it. In explaining its decision in that regard in its February 13, 2004 opinion, the Trial Court stated that it found that WSRC was an "alter ego" of WEC, and was therefore subject to the assertion of jurisdiction in Pennsylvania. (App. D at page D-2).

On April 22, 2005 the Pennsylvania Superior Court affirmed in all respects the decision and judgment of the Trial Court. (App. A). As to the personal jurisdiction issue, the Superior Court ruled that there was sufficient evidence to support a conclusion that (1) WSRC purposefully directed business activities toward residents of Pennsylvania and could reasonably anticipate being hailed into court in Pennsylvania, and (2) the nature and quality of WSRC's contacts with Pennsylvania were such as to "make it reasonable and fair" to require WSRC to conduct its defense to Hollingsworth's complaint in Pennsylvania. (App. A at pages A-11 to A-14). The Superior Court's conclusions were based principally upon routine contacts between WSRC and its then-parent, WEC. (*Id.*) Based on these contacts, the Superior Court ruled that jurisdiction

could be asserted over WSRC under Pennsylvania's long-arm statute without violating the due process clause of the United States Constitution. (*Id.*)

REASONS FOR GRANTING THE WRIT

The Pennsylvania Superior Court has decided an important issue relating to personal jurisdiction in a manner which is inconsistent with decisions of this Court and of numerous federal appellate courts. Specifically, the Superior Court upheld the assertion of personal jurisdiction over WSRC, a non-resident corporation which itself had virtually no contacts with Pennsylvania, on the basis of WSRC's contacts with its former parent corporation, WEC. The Superior Court reached its conclusion that jurisdiction could be asserted over WSRC despite the absence of any evidence that WSRC was controlled or dominated by WEC, or that WSRC and WEC had somehow disregarded their separate corporate identities in a manner which would justify a finding that WSRC was the mere alter ego or instrumentality of WEC. Virtually all of the "contacts" listed in the Superior Court's opinion as support for its decision affirming the assertion of personal jurisdiction over WSRC amount to nothing more than the type of interaction one would normally expect to occur between parent and subsidiary corporations. (*See* App. A at pages A-11 to A-13). Accepting the Superior Court's conclusion that WSRC's contacts with WEC support the assertion of personal jurisdiction in this case essentially creates a rule under which a wholly-owned subsidiary is *always* the alter ego of its parent for purposes of personal jurisdiction. This Court should grant review of the Superior Court's decision to correct that Court's misapplication of

long standing principles governing the constitutionality of the assertion of personal jurisdiction in the context of relationships between affiliated corporate entities.

As discussed more fully below, the Superior Court's decision is in direct conflict with decisions of both this Court and numerous federal courts of appeals. Respecting the separate corporate identities of parent and subsidiary corporations is a principle "deeply engrained in our economic and legal systems." *United States v. Bestfoods, Inc.*, 524 U.S. 51, 61 (1998). Prior decisions of this Court firmly establish that for purposes of personal jurisdiction, parent and subsidiary corporations are generally considered separate and independent. *See, e.g., Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984); *Cannon Manufacturing Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925). Also, the Fourteenth Amendment's due process clause prohibits a state court from rendering judgment against a defendant with which it lacks "contacts, ties or relations." *International Shoe v. Washington*, 326 U.S. 310, 319 (1945). Due process allows a court to assert personal jurisdiction over a non-resident defendant only if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate traditional notions of fair play and substantial justice. *Id.* at 316. As this Court noted in *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 292 (1980), the "minimum contacts" requirement serves two important functions: "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to insure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system." 444 U.S. at 292. Based on these general principles, jurisdiction is proper only where a defendant's

"contacts proximately result from the actions by the defendant himself that create a 'substantial connection' with the forum state." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

Personal jurisdiction may be either specific or general. A court has specific jurisdiction when the defendant "purposefully directed" his activities as a forum resident and injuries "arise out of or relate to" those activities. *Burger King*, *supra*, 471 U.S. at 472. In contrast, to exercise general jurisdiction, as the Pennsylvania court appears to have done in the instant case,[3] the defendant's activities in the forum state must be so "continuous and systematic" as to render it a de facto resident of that state. *Helicopteros Nacionales de Columbia S.A. v. Hall*, 466 U.S. 408, 414-415 (1984).

Moreover, it is well-settled that a state court may not assert jurisdiction over a subsidiary corporation on the basis of the presence of the subsidiary's parent in the forum unless the subsidiary is so dominated or controlled by the parent that it may be considered the parent's mere "instrumentality" or "alter ego." In *Cannon Manufacturing*

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[3] As noted *supra*, the ruling of the Trial Court upholding the exercise of personal jurisdiction was based upon its finding that WSRC was the alter ego of its then-parent, WEC. (App. D at page D-2). That ruling arguably constitutes an exercise of general jurisdiction. The Superior Court, in affirming the Trial Court's ruling on personal jurisdiction, noted the distinction between specific and general jurisdiction, but its opinion did not specifically articulate which type of jurisdiction it was applying. Nevertheless, a fair reading of the Superior Court's opinion, and a review of the list of "contacts" it found WSRC to have with Pennsylvania (App. A at pages A-11 to A-13), suggests that the Superior Court, like the Trial Court, applied principles of general jurisdiction to uphold the assertion of personal jurisdiction over WSRC in Pennsylvania.

Co. v. Cudahy Packing Co., 267 U.S. 333 (1925), this Court ruled that jurisdiction over a parent corporation could not be asserted on the basis of activities of a subsidiary in the forum, and that in the absence of control by the parent, and as long as the parent and subsidiary maintain separate and distinct corporate identities, presence of one in the forum state may not be attributed to the other. 267 U.S. at 335-336. *See also Keeton v. Hustler Magazine*, *supra*, 465 U.S. at 781 n. 13 (noting that "jurisdiction over a parent [does not] automatically establish jurisdiction over a wholly-owned subsidiary").

This Court's ruling in *Cannon* has been consistently followed by other federal courts of appeal which have ruled that in order to justify the assertion of personal jurisdiction over a non-resident corporation on the basis of contacts between parent and subsidiary corporations, there must be evidence establishing that the subsidiary is dominated or controlled by the parent, or that the entities have failed to employ procedures intended to maintain their separate corporate identities. For example, in *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934 (7th Cir. 2000), *cert. denied*, 532 U.S. 943 (2001), the Seventh Circuit upheld a district court's ruling that jurisdiction could not be asserted over a Canadian parent on the basis of its contacts with a resident subsidiary. In so ruling, the Seventh Circuit noted that the parent and subsidiary had conducted business as separate corporate entities, had maintained separate books, records, financial statements, and tax returns, and had observed all corporate formalities. 230 F.3d at 945. Noting the absence of any evidence which supported a finding that the parent exercised control or dominated the subsidiary, the Court of Appeals

adopted "the rule that a corporate parent may provide administrative services for its subsidiary in the ordinary course of business without calling into question the separateness of the two entities for purposes of personal jurisdiction." *Id.* at 945.

Similarly in *Mylan Laboratories, Inc. v. Akzo, N.V.*, 2 F.3d 56 (4th Cir. 1993), the Court of Appeals for the Fourth Circuit ruled that personal jurisdiction could not be asserted over a parent corporation on basis of the presence in the state of its subsidiary, where there was no evidence that the parent controlled the day-to-day activities of the subsidiary, and the parent and subsidiary observed corporate formalities by maintaining separate books, records and accounts. 2 F.3d at 61-62. In reaching its conclusion, the Fourth Circuit noted that the parent and subsidiary had "studiously observed all corporate formalities" and that there was no evidence that the parent exerted control over the subsidiary's marketing, purchasing, pricing, management or operating policies. *Id.* at 62.

Likewise, in *DeCastro v. Sanfill, Inc.*, 198 F.3d 282 (1st Cir. 1999), the First Circuit ruled that jurisdiction could not be asserted over a parent on the basis of its subsidiary's presence in the forum, notwithstanding evidence showing a substantial overlap among officers and directors of the two corporations. 198 F.3d at 285. The First Circuit's ruling was predicated on its observation that there was no direct evidence of the parent's control of its subsidiary's day-to-day operations, and on evidence which showed that "formal corporate separateness was observed at the most basic level." *Id. See also Hargrave v. Fiberboard Corp.*, 710 F.2d 1154, 1158-1161 (5th Cir. 1983) (citing *Cannon* "for the proposition that so long as a parent and subsidiary maintain separate and distinct corporate

entities, the presence of one in a forum state may not be attributed to the other").

The Superior Court's opinion in the instant case is inconsistent with these long-standing principles which have been repeatedly enunciated by this Court and by the various federal appellate courts discussed above. Specifically, the Superior Court's ruling that personal jurisdiction could be constitutionally asserted over WSRC based upon contacts between WSRC and its parent which are similar to those found to be inadequate to justify personal jurisdiction in the various federal appellate decisions discussed above. For example, the Superior Court's opinion noted that WSRC was wholly owned by WEC, that WSRC and WEC had overlapping membership on their respective boards of directors, that WSRC received some directives from WEC, and that WEC received profits from WSRC. (App. A at page A-11). Those contacts do not, however, establish domination or control. *E.g.*, *United States v. Bestfoods, Inc.*, 524 U.S. 51, 69 (1998) (noting that it is considered a normal attribute of corporate ownership that officers and directors of the parent serve as officers and directors of the subsidiary).

Likewise, the observation of the Superior Court (App. A at page A-12) that WEC employees may have worked on the proposal to obtain the contract with DOE does not support the assertion of jurisdiction over WSRC. First, these activities have nothing to do with Hollingsworth's claim for supplemental pension benefits under a pension plan established by WSRC in South Carolina years later. Second, even if these activities occurred, they took place prior to the formation of WSRC. After the contract was awarded by the DOE, WSRC was established as a separate subsidiary and

at all times thereafter WSRC and WEC maintained separate corporate identities. *See* page 6 *supra*.

Moreover, much of the evidence cited in the Superior Court's opinion actually rebuts, rather than supports, a finding that WSRC's contacts with WEC justified the assertion of personal jurisdiction over WSRC. For example, the Superior Court correctly noted that more than 400 persons transferred from WEC to WSRC (App. A at page A-11), but failed to point out that in connection with those transfers, all of the transferees, including Hollingsworth, were required to formally terminate their employment with WEC to become WSRC employees. Also, the Superior Court noted that on the few occasions when employees were temporarily "loaned" by WSRC to WEC, those temporary transfers were made pursuant to an Internal Works Requisition ("IWR"). (App. A at page A-13). Again, the Superior Court ignored the undisputed evidence that the use of IWRs also included a procedure requiring WEC to reimburse WSRC for the salary and benefits paid by WSRC to the employees during the period of the temporary transfers. This evidence actually provides compelling confirmation that WSRC and WEC scrupulously followed formalities and procedures which maintained their separate identities.

In short, the Superior Court's decision in this case eviscerates the long-standing jurisdictional principles previously recognized by this Court and by numerous federal appellate courts – *i.e.*, that the separate corporate identities of a parent and its subsidiary may not be disregarded unless there is evidence that the parent so dominates and controls the subsidiary that the subsidiary is a mere instrumentality of the parent. If allowed to stand, the Superior Court decision will authorize lower courts to

ignore the separate identities of parent and subsidiary corporations and sanction the assertion of personal jurisdiction in a manner inconsistent with the due process clause.

Resolution of the conflict between the Superior Court opinion and the decisions of this Court and the numerous federal appellate courts discussed *supra* is of vital importance to modern commerce. Judicial respect for, and recognition of, the separate corporate identities of parent and subsidiary corporations is a bedrock principle of American corporate law. *Bestfoods*, *supra*, 524 U.S. at 61. Judicial disregard of the separate corporate identities of a parent corporation and its subsidiary also detracts from the primary purpose of the due process clause, which is to insure that non-residents can predict, with "minimum assurance," where they will and will not be subject to suit. *World-Wide Volkswagen*, *supra*, 444 U.S. at 297. Indeed, it is this element of forseeability and predictability which is protected by the due process clause's requirement that a "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court here." *Id.* This Court should grant review of the Superior Court's decision to correct that Court's misapplication of these important jurisdictional and constitutional principles.

CONCLUSION

On the basis of the foregoing, Petitioner WSRC respectfully requests that the Court grant the petition for a writ of certiorari, and reverse the decision and judgment of the Pennsylvania Superior Court which upheld the assertion of personal jurisdiction over WSRC.

Respectfully submitted,

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APPENDIX A

J. A47019/04

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

STEPHEN D. HOLLINGSWORTH,	:	
Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
WESTINGHOUSE SAVANNAH RIVER CORPORATION,	:	No. 2265 WDA 2003
Appellant	:	

Appeal from the Judgment entered on November 26, 2003 in the Court of Common Pleas of Allegheny County, Civil Division, No. GD 99-18449

BEFORE: HUDOCK, MUSMANNO and TAMILIA, JJ.

MEMORANDUM FILED: April 22, 2005

Westinghouse Savannah River Corporation ("WSRC") appeals from the judgment of $255,423.50 entered against it and in favor of Stephen D. Hollingsworth ("Hollingsworth"). We affirm.

The pertinent facts of this case are as follows.[1] Hollingsworth, a nuclear engineer, worked for Westinghouse Electric Corporation ("WEC") from 1973 to July 1989. He then transferred to WSRC, along with 400 other

[1] We also adopt the extensive factual findings of the trial court. *See* Trial Court Opinion (Judge Judith L. A. Friedman, 4/29/04, at 3-18).

WEC employees. WSRC manages the Savannah River site in South Carolina, which provides services to the United States nuclear defense industry. In 1995, Hollingsworth terminated his employment with WSRC and returned to WEC, where he was employed until November 30, 1996. He then took an early retirement because his position was eliminated.

The WEC employees who transferred to WSRC subsequently discovered that their monthly pension from WSRC would be less than if they had stayed at WEC. The transferred employees complained to WSRC. WSRC then developed a plan, "the Delta Plan," to resolve the shortfall. The employees were informed of this plan in a June 28, 1993 memorandum ("the Memorandum"). The Memorandum provided, in pertinent part, as follows:

> At the time of retirement of a WSRC employee transferred to this site from another Corporate location, a calculation will be made which will compare the pension amount that the transferee would have received had he/she remained in the Corporate Pension Plan until retirement and the amount of pension earned at retirement as a result of the combination of WSRC pension and previously earned Corporate pension.
>
> If the amount of pension that he/she would have earned should they have remained in the Corporate Pension Plan exceed[s] the total combined Corporate and WSRC pension, such amount will be referred to as the "Delta." The "Delta" will then be reduced by the value of other applicable factors such as the value of the employee contributions, survivor benefit options, post-retirement medical or any incentive retirement programs which may be in effect at the time of retirement.

WSRC Inter-Office Memorandum, 1/28/93.

After Hollingsworth retired, WSRC informed him, on January 24, 1997, that he would be entitled to a benefit under the Delta Plan of $609.00 per month. Hollingsworth argued that he was entitled to an additional $60.00 per month. Subsequently, WSRC advised Hollingsworth that he was not entitled to *any* Delta benefit because he had not retired from WSRC. Hollingsworth then filed the instant action, in 1999, against WSRC and WEC, asserting breach of contract, fraudulent misrepresentation, and promissory estoppel.

WSRC filed preliminary objections asserting lack of personal jurisdiction over WSRC, a Delaware corporation with headquarters in South Carolina. Judge Paul F. Lutty, Jr., denied the preliminary objections.

Subsequently, both WSRC and WEC filed Motions for summary judgment. Both WSRC and WEC claimed that the Employment Retirement Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1001 *et seq.*, preempted Hollingsworth's causes of action. In opposition to the summary judgment Motions, Hollingsworth alleged that ERISA did not preempt his state law claims. Judge Frank Lucchino granted WEC's Motion for summary judgment on all counts, denied WSRC's Motion for summary judgment, and ruled that all of Hollingsworth's claims against WSRC were preempted by ERISA, but held that the action should proceed by converting the state law claims to an ERISA claim.

WSRC filed a second Motion for summary judgment alleging that the addition of an ERISA claim was barred by the statute of limitations. The parties agreed to ask Judge Lucchino for a clarification of his Order. Judge Lucchino then issued an Order indicating that Hollingsworth "if he so

wishes, may amend his pleadings to elaborate on" the ERISA issue. Hollingsworth did not file an amended Complaint. Judge Friedman denied WSRC's second Motion for summary judgment.

After a non-jury trial, Judge Friedman found in favor of Hollingsworth in the amount of $182,781.00. Judge Friedman ruled that Hollingsworth was entitled to receive benefits under the Delta Plan, and that the amount should be $60.00 more than the $609.00 per month calculated by WSRC. WSRC filed a post-trial Motion for judgment *n.o.v.*, and Hollingsworth filed a post-trial Motion to mold the verdict to add attorney's fees. Judge Friedman denied WSRC's Motion, granted Hollingsworth's Motion, and increased the verdict by $72,642.50. WSRC then filed this timely appeal.

WSRC raises the following issues on appeal:

1. Whether the trial court erred in denying WSRC's preliminary objections challenging personal jurisdiction?

2. Whether the trial court erred in permitting Hollingsworth to proceed under ERISA?

3. Whether the trial court erred in interpreting the June 28, 1993 Memorandum as requiring payment of a supplemental pension plan to Hollingsworth?

4. Whether the trial court erred in awarding Hollingsworth an extra $60.00 per month as part of its remedy?

5. Whether the trial court erred in awarding Hollingsworth a lump sum payment for future benefits under the supplemental payment plan?

See Brief *of* Appellant at 4.

WSRC first contends that the trial court erred in denying WSRC's preliminary objections challenging the trial court's exercise of personal jurisdiction over WSRC. WSRC contends that the trial court's exercise of personal jurisdiction was improper because (1) WSRC does not have significant contacts with Pennsylvania; (2) Hollingsworth's cause of action did not arise out of any activities by WSRC in Pennsylvania; and (3) WSRC is not the "alter ego" of WEC.

"Our standard of review of the trial court['s] overruling [of] preliminary objections is to determine whether the trial court committed an error of law." ***Mar-Eco, Inc. v. T & R and Sons Towing and Recovery, Inc.,*** 837 A.2d 512, 514 (Pa. Super. 2003). "When reviewing a challenge to the trial court's exercise of jurisdiction, . . . the burden rests upon the party challenging the trial court's jurisdiction, so we must consider the evidence in the light most favorable to the non-moving party." ***Fidelity Leasing, Inc. v. Limestone County Bd. of Educ.,*** 758 A.2d 1207, 1210 (Pa. Super. 2000) (citation omitted).

"The question of whether a state may exercise *in personam* jurisdiction over a non-resident defendant must be tested against both the state's long-arm statute and the Due Process Clause of the Fourteenth Amendment to the United States Constitution." ***Kubik v. Letteri,*** 614 A.2d 1110, 1112 (Pa. 1992). The Pennsylvania long-arm statute provides in pertinent part as follows:

> **§ 5322. Bases of personal jurisdiction over persons outside this Commonwealth**
>
> **(a) General rule.** – A tribunal of this Commonwealth may exercise personal jurisdiction over a person . . . :

1. Transacting any business in this Commonwealth. . . .

2. Contracting to supply services or things in this Commonwealth.

3. Causing harm or tortious injury by an act or omission in this Commonwealth.

4. Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

5. Having an interest in, using, or possessing real property in this Commonwealth.

(6)(i) Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting. . . .

(7) Accepting election or appointment or exercising powers under the authority of this Commonwealth as a:

(i) Personal representative of a decedent.

(ii) Guardian of a minor or incapacitated person.

(iii) Trustee or other fiduciary.

(iv) Director or officer of a corporation.

(8) Executing any bond of any of the persons specified in paragraph (7).

(9) Making application to any government unit for any certificate, license, permit, registration or similar instrument or authorization or exercising any such instrument or authorization.

(10) Committing any violation within the jurisdiction of this Commonwealth of any statute,

home rule charter, local ordinance or resolution, or rule or regulation promulgated thereunder by any government unit or of any order of court or other government unit.

(b) Exercise of full constitutional power over nonresidents. – In *addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.*

42 Pa.C.S.A. § 5322 (emphasis added).[2]

The Pennsylvania long-arm statute permits jurisdiction to be exercised "to the fullest extent allowed under the Constitution of the United States and may be based upon the most minimum contact with this Commonwealth allowed

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[2] Section 5301 provides in pertinent part:

§ 5301. Persons

(a) General rule. – The existence of any of the following relationships between a person and this Commonwealth shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction over such person. . . .

(2) Corporations. –

(i) Incorporation under or qualification as a foreign corporation under the laws of this Commonwealth.

(ii) Consent, to the extent authorized by the consent.

(iii) The carrying on of a continuous and systematic part of its general business within this Commonwealth. . . .

42 Pa.C.S.A. § 5301.

> under the Constitution of the United States." 42 Pa.C.S.A. § 5322(b).[3] . . .

Fidelity Leasing, Inc, v. Limestone County Bd. of Educ., 758 A.2d 1207, 1210 (Pa. Super, 2000) (citation omitted). This Court has explained that:

> [t]he Pennsylvania Long-Arm Statute, 42 Pa.C.S.A. § 5322, is basically divided into two sections. Section (a) contains ten subsections, which specify particular types of contact with Pennsylvania which will be deemed sufficient to warrant the exercise of long-arm personal jurisdiction. *Section (b) is a catchall provision which authorizes the exercise of personal jurisdiction over persons who do not come within one of the express provisions of the ten subsections of section (a) so long as the minimum requisites of federal constitutional law are met.*
>
> . . .
>
> As a practical matter, each of the ten subsections of [section] 5322(a) are wholly subsumed within the catchall provision of [section] 5322(b). Consequently, . . . it is unnecessary and perhaps unwise to enter into a subtle and potentially confusing analysis of the precise scope of any of the subsections of [section] 5322(a). Rather, the only appropriate focus . . . is whether the minimum requisites of due process have been met. If they have not been met, the various subsections of [section] 5322(a) cannot statutorily authorize

[3] Pennsylvania courts have recognized that this provision renders the reach of the long-arm statute coextensive with that permitted by the Due Process Clause of the Fourteenth Amendment.

> an unconstitutional exercise of *in personam* jurisdiction. If they have been met, then [section] 5322(b) authorizes the exercise of *in personam* jurisdiction, and any analysis of the potential applicability of the subsections of [section] 5322(a) would be superfluous. . . .

Scoggins v. Scoggins, 555 A.2d 1314, 1318-19 (Pa. Super. 1989) (emphasis added) (footnote omitted).

As indicated above, the proper focus of our inquiry is on the minimum requirements of due process. Those requirements are summarized as follows:

> The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects an individual's liberty interest by not allowing him to be subject to the jurisdiction of a foreign forum with which he has established no meaningful contacts, ties or relations. ***Burger King [Corp. v. Rudzewicz],*** 471 U.S. [462,] 471-72 . . . (1985). In order for a state to assert *in personam* jurisdiction over a non-resident defendant, due process requires the defendant to have "certain *minimum contacts* with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" ***International Shoe Co. v. Washington,*** 326 U.S. 310, 316 . . . (1945) (emphasis added).
>
> . . .
>
> The standard which must be met by a state in asserting specific personal jurisdiction over a non-resident defendant as articulated in ***Burger King*** is clear: (1) the non-resident defendant must have sufficient minimum contacts with the forum state and (2) the assertion of *in personam*

jurisdiction must comport with fair play and substantial justice. ***Id.*** The determination of whether this standard has been met is not susceptible of any talismanic jurisdictional formula: the facts of each case must always be weighed in determining whether jurisdiction is proper. 471 U.S. at 485-86. . . .

[T]he . . . determination of whether sufficient minimum contacts exist for the assertion of *in personam* jurisdiction is based on a finding that the "defendant's conduct and [his] connection with the forum State are such that he should reasonably anticipate being haled into court there." ***Burger King,*** 471 U.S. at 474. . . . Critical to [this] analysis, . . . is the determination that the defendant purposefully directed his activities at residents of the forum and purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. Contacts with the forum that are "random," "fortuitous" or "attenuated" are not sufficient for the assertion of personal jurisdiction nor is unilateral activity in the forum by others who claim some relationship with the defendant. ***Burger King,*** 471 U.S. at 475. . . .

. . .

Notwithstanding the determination that a non-resident defendant purposefully established minimum contacts with the forum, *in personam* jurisdiction may only be asserted over a non-resident defendant when the nature and quality of that defendant's activities are such as to make it reasonable and fair to require him to conduct his defense in the state. ***Burger King,*** 471 U.S. at 476. . . . Factors to be considered include (1)

> the burden on the defendant, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies and (5) the shared interest of the several states in furthering fundamental substantive social policies. ***Burger King,*** 471 U.S. at 477. . . .

Kubik, 614 A.2d at 1113.

The record before the trial court demonstrated a number of significant contacts of WSRC with Pennsylvania, including its various relationships with its parent, WEC. Those relationships and contacts were well-summarized in Hollingsworth's Brief and Supporting Affidavit in Opposition to WSRC's Brief in Support of Preliminary Objections, filed July 26, 2000 in the trial court. (***See*** R. 142a-157a; 158a-319a; 60a-94a). Those contacts and relationships included the following:

> – during the relevant time period, WEC was a corporation organized under the laws of Pennsylvania, with its business headquarters in Monroeville, Pennsylvania;
>
> – prior to March 22, 1999, WSRC was a one hundred percent wholly-owned subsidiary of CBS Corporation ("CBS"), which was formerly WEC;
>
> – in 1989, over four hundred WEC engineers, scientists, and managers transferred to the Savannah River site;
>
> – WSRC received management directives and management guidance from WEC;

– many of WSRC's top managers, including WSRC's president, had transferred to WSRC from WEC in 1989 and thereafter;

– in 1996, seven of WSRC's eight board members were employed by WEC; in 1989, four of WSRC's seven board members were employed by WEC;

– WEC's proposal to the Department of Energy for a contract to manage the Savannah River site was prepared by WEC employees at Waltz Mill in Pennsylvania;

– WEC's seeking of the Savannah River contract was motivated by WEC's desire to keep personnel who were specialized in nuclear reactor design and construction within the WEC system in case of a resurgence of the nuclear power business;

– WSRC executives were listed in the WEC personnel directory, published in Trafford, PA;

– WSRC employees whose jobs were eliminated during downsizing had their resumes circulated within WEC for other jobs;

– when Hollingsworth retired from WEC, WEC gave him a WEC clock indicating that he had 23 years of service; Hollingsworth worked 17 years at WEC and 6 years at WSRC;

– when WEC/WSRC employees transferred, it was considered an internal transfer;

– during the downsizing of WEC in 1996, a binder listing open positions at WSRC was circulated in the Westinghouse Energy Center in Pennsylvania;

– in 1989, Hollingsworth spoke to Edward Preston Rahe, Jr. ("Rahe"), a former WEC employee who had been transferred to WSRC, about the possibility of Hollingsworth becoming employed by WSRC; Rahe offered Hollingsworth a job at WSRC;

– before transferring to WSRC, Hollingsworth had an exit interview with Linda Danask, a WEC human resources employee; Danask told Hollingsworth that, upon his retirement, he would receive two pension checks, one from WEC and one from WSRC, which would equal the total he would have received from WEC;

– Buck Consultants of Pittsburgh, PA, performed the calculations relevant to the Delta plan for WSRC;

– in May 1995, Dr. Keith Paulson requested that Hollingsworth be transferred back to WEC in Pennsylvania from WSRC; such transfer was made pursuant to an Inter Works Requisition (IWR); IWR was used to transfer employees from one WEC department to another;

– WEC received profits from WSRC.[3]

These and other pertinent factors, as set forth above and in Hollingsworth's Brief and Supporting Affidavit in Opposition to WSRC's Brief in Support of Preliminary Objections, support a conclusion that (1) WSRC purposefully directed business activities toward residents of Pennsylvania and could reasonably anticipate being haled

[3] Other contacts and relationships between WEC and WSRC are set forth in Hollingsworth's Brief and Supporting Affidavit in Opposition to WSRC's Brief in Support of Preliminary Objections.

into court here; and (2) the nature and quality of WSRC's contacts with Pennsylvania were such as to "make it reasonable and fair" to require WSRC to conduct its defense to Hollingsworth's Complaint in Pennsylvania. Thus, we conclude that the trial court did not err in denying WSRC's preliminary objections to the Complaint.

WSRC's next argument on appeal is that the trial court erred in permitting Hollingsworth to proceed with a claim for benefits under ERISA because Hollingsworth never asserted that claim until after the statute of limitations had expired. WSRC argues that the Complaint filed by Hollingsworth on November 16, 1999, did not assert any ERISA claims, but instead set forth state law claims for breach of contract, misrepresentation, and promissory estoppel. WSRC asserts that Hollingsworth did not assert an ERISA claim until November 13, 2001, when he filed a Consolidated Brief in Opposition to WSRC's Motion for Summary Judgment.

Our scope of review of questions of law is plenary. ***Phillips v. A-Best Products Co.,*** 665 A.2d 1167, 1170 (Pa. 1995).

> In reviewing a grant of summary judgment, an appellate court may disturb the order of the trial court only where there has been an error of law or a manifest abuse of discretion. Nevertheless, the scope of review is plenary and the appellate court shall apply the same standard for judgment as the trial court. . . . The record is to be viewed in the light most favorable to the nonmoving party, and all doubts as to the presence of a genuine issue of material fact must be resolved against the moving party.

Albright v. Abington Memorial Hospital, 696 A.2d 1159, 1165 (Pa. 1997) (citations omitted).

Section 502(a)(1)(B) of ERISA provides that a civil action may be brought by a "participant or beneficiary . . . to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . . " 29 U.S.C.A. § 1132(a)(1)(B). State courts have concurrent jurisdiction with the federal district courts to hear ERISA claims. 29 U.S.C.A. § 1132(e). Although section 502(a)(1)(B) does not include a statute of limitations, the federal courts of appeals have applied state statutes of limitations for contract actions in cases implicating section 502(a)(1)(B). ***Syed v. Hercules Inc.***, 214 F.3d 155, 159 (3rd Cir. 2000); ***Gluck v. Unisys Corp.***, 960 F.2d 1168, 1179 (3rd Cir. 1992). In Pennsylvania, the statute of limitations applicable to a breach of contract claim is four years. 42 Pa.C.S.A. § 5525(a).

A complaint may state an ERISA claim without expressly referring to the ERISA statute. ***Vickery v. United Medical Resources***, 43 F.3d 1208, 1209 (8th Cir. 1994); ***see Bartholet v. Reishauer A.G. (Zurich)***, 953 F.2d 1073, 1078 (7th Cir. 1992) (stating that a complaint need not identify a specific legal theory). In addition, "ERISA's civil enforcement provision, [section] 502(a) (29 U.S.C. § 1132(a)), completely preempts state law claims that come within its scope and converts these state claims into federal claims under [section] 502." ***Darcangelo v. Verizon Communications, Inc.***, 292 F.3d 181, 187 (4th Cir. 2002) (citing ***Metropolitan Life Ins, Co. v. Taylor***, 481 U.S. 58, 65-66 (1987)).

Hollingsworth's Complaint, filed in November 1999, and never amended, alleges that WSRC failed to pay retirement benefits as promised. ***See*** Complaint, 11/17/99, Counts I and II. Pursuant to the above-cited authority, Hollingsworth's allegation states an ERISA claim, even though the Complaint does not specifically mention the ERISA statute. In addition, Hollingsworth's cause of action arose in 1997, when WSRC denied his request for a Delta Plan pension benefit. Thus, Hollingsworth's Complaint, filed in 1999, was brought within four years, as required by the applicable statute of limitations.

Further, we find no merit to WSRC's claim that the Pennsylvania Rules of Civil Procedure would preclude the trial court from considering the allegations of Hollingsworth's Complaint as an ERISA claim.

> Under the [Pennsylvania] Rules of Civil Procedure, a plaintiff is not obligated to state the legal theory or theories underlying his complaint. *Pa.R.C.P.1019(a)* requires only allegations of the "material facts on which a cause of action . . . is based." . . . The obligation to discover the cause or causes of actions is on the court: the plaintiff need not identify them. . . .

McClellan v. Health Maintenance Organization of Pennsylvania, 604 A.2d 1053, 1059-60 (Pa. Super. 1992) (citations omitted); ***see also Griffin v. Rent-A-Center, Inc.***, 843 A.2d 393, 395 (Pa. Super. 2004) (holding that in Pennsylvania, plaintiffs need only plead facts constituting the cause of action; the plaintiff is not required to specify the legal theory underlying the complaint).

In this case, the facts pled in Hollingsworth's Complaint support the assertion of an ERISA theory, even

though Hollingsworth did not specifically set forth ERISA as a legal theory in his Complaint. Based on the above-cited authority, we conclude that the trial court did not err in determining that Hollingsworth's Complaint should be treated as stating an ERISA cause of action from its inception. ***See Darcangelo,*** 292 F.3d at 187 (holding that section 502(a) of ERISA completely preempts state law claims that come within its scope and converts those claims into federal claims under section 502).

WSRC's next argument is that the trial court erred in refusing to interpret the June 28, 1993 Memorandum as requiring that an employee be a WSRC employee at the time of retirement in order to qualify for the Delta Plan benefit. WSRC asserts that federal common law rules of contract interpretation apply to the interpretation of ERISA plan documents. WSRC contends that the trial court's interpretation of the June 28, 1993 Memorandum, particularly the trial court's interpretation of the phrase, "at the time of retirement of a WSRC employee," is clearly erroneous, not supported by credible evidence, and contrary to well-established principles of contract interpretation.

We review WSRC's contentions pursuant to the following standards. In reviewing a trial court's decision in a non-jury trial, we are limited to a determination of whether the trial court's findings are supported by competent evidence and whether the trial court committed an error of law. ***Anderson v. The Litke Family Ltd. Partnership,*** 748 A.2d 737, 738-39 (Pa. Super. 2000). "When this court reviews the findings of the trial judge, the evidence is viewed in the light most favorable to the victorious party below and all evidence and proper inferences favorable to

that party must be taken as true and all unfavorable inferences rejected." ***Id.*** at 739.

It is not within the province of the Superior Court to find facts or substitute judgment for that of the trial court. ***Hodges v. Rodriguez,*** 645 A.2d 1340, 1343 (Pa. Super. 1994). "In a bench trial, the trial court is free to believe all, part, or none of the evidence presented, to make all credibility determinations, and to resolve any conflicts in the evidence." ***Wallace v. Pastore,*** 742 A.2d 1090, 1094 (Pa. Super. 1999).

Further, in reviewing the denial of a motion for judgment *n.o.v.*, we must determine "whether, reading the record in the light most favorable to the verdict winner and granting him the benefit of every favorable inference, there is sufficient competent evidence to support the verdict." ***Wenrick v. Schloemann-Siemag,*** 564 A.2d 1244, 1246 (Pa. 1989). "Judgment *n.o.v.* may be granted only in clear cases, where the facts are such that no two reasonable minds could fail to agree that the verdict was improper." ***Schneider v. Lindenmuth-Cline Agency,*** 620 A.2d 505, 507 (Pa. Super. 1993).

WSRC asserts that the language of the Delta Plan, that "at the time of retirement of a WSRC employee transferred to this site from another Corporate location," clearly and unambiguously indicates that the Delta Plan is only available to persons who, at the time of their retirement, are employees of WSRC. WSRC asserts that the trial court's interpretation of the above phrase to apply to Hollingsworth, who was not a WSRC employee at the time of his retirement, essentially amounts to a re-writing of the June 28, 1993 Memorandum, and violates principles of contract interpretation. WSRC relies on ***Musto v. American***

General Corp., 861 F.2d 897, 906 (6th Or. 1988) (holding that "each provision of a contract should be interpreted as part of an integrated whole, to the end that *all* of the provisions may be given effect if possible").

WSRC also argues that the trial court's interpretation of the above-described language of the June 28, 1993 Memorandum is inconsistent with other parts of the Memorandum, including the provision listing factors which will reduce the Delta Plan benefit for an employee, and the reference to a "previously earned Corporate pension." WSRC contends that because Hollingsworth earned a Corporate pension from WEC before and after his employment at WSRC, the Memorandum must be interpreted as not applying to Hollingsworth. Additionally, WSRC argues that the factors listed in the Memorandum that will reduce the Delta Plan benefit, do not apply to Hollingsworth; therefore, the proper interpretation of the Memorandum is that the Delta Plan was not intended to apply to someone in Hollingsworth's position.

WSRC further asserts that the trial court's interpretation ignored the multitude of evidence, including evidence of discussions and actuarial calculations and the negotiation process with the United States Department of Energy ("DOE"), which established that the Delta Plan's premise was that an employee would be employed by WSRC at the time of retirement.

A summary plan description, pursuant to ERISA, "shall contain the following information: . . . the plan's requirements respecting eligibility for participation and benefits; [and] . . . circumstances which may result in disqualification, ineligibility, or denial or loss of benefits. . . . " 29 U.S.C. § 1022(b). An ambiguity in an ERISA

summary plan description "must be resolved in favor of the employee and made binding against the drafter." ***Hansen v. Continental Ins, Co.***, 940 F.2d 971, 982 (5th Cir. 1991). Further, the summary plan description

> should provide information about the general circumstances in which benefits could be lost. The plan's rules should be explained to permit the ordinary employee to recognize that certain events or actions could trigger a loss of benefits. It need not discuss every imaginable situation in which such events or actions might occur, but it must be specific enough to enable the ordinary employee to sense when there is a danger that benefits could be lost or diminished.

Arnold v. Arrow Transp. Co. of Delaware, 926 F.2d 782, 785 (9th Cir. 1991) (citations omitted).

In the instant case, the June 28, 1993 Memorandum contained no provisions indicating that a WSRC employee who did not retire directly from WSRC, would be precluded from receiving the Delta Plan benefit. Reviewing WSRC's allegations in the light most favorable to Hollingsworth, as required by our standard of review, we conclude that the trial court did not err in its interpretation of the June 28, 1998 Memorandum. We adopt the trial court's conclusions in this regard. ***See*** Trial Court Opinion, 4/29/04, at 22-23.

Next, WSRC argues that, with the exception of Beverly Adams, a WSRC employee, all of the other witnesses who were involved in the establishment of the Delta Plan testified at trial by deposition. Therefore, WSRC asserts that the trial court did not observe these witnesses' demeanor and this Court should not have to defer to the trial court's assessment of the weight to be accorded their

testimony. WSRC cites ***In re Estate of Rosen,*** 819 A.2d 585, 589 (Pa. Super. 2003) (holding that "where the chancellor who issued the final adjudication and decree did not hear the witnesses testify, 'an appellate court is certainly in as good position as the [chancellor] to judge the probative weight of evidence. . . . '").

We note that WSRC did not raise this issue in its Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. 1925(b). Thus, the issue is waived. ***See McKeeman v. Corestates Bank, N.A.***, 751 A.2d 655, 658 (Pa. Super. 2000) (holding that failure to include an issue in a Rule 1925(b) Concise Statement waives that issue for purposes of appellate review).

However, WSRC properly preserved the similar issue of whether the trial court erred in discrediting the testimony of Paul Matthews. ***See*** Concise Statement of Matters Complained of on Appeal, Par. 3(B); Motion for Post-Trial Relief, Par. 1(B). In reviewing this contention, we conclude that even though Matthews's testimony was offered by deposition, it is nevertheless the responsibility of the trial court in a non-jury trial to make findings and conclusions based on the evidence before it. In doing so, the trial court is free to believe all, part, or none of the evidence presented and to resolve any conflicts in the evidence. ***Wallace v. Pastore,*** 742 A.2d 1090, 1094 (Pa. Super. 1999). In the instant case, the trial court rejected Matthews's testimony, for the reasons stated in its Opinion. ***See*** Trial Court Opinion, 4/29/04, at 13-15, 23-24. Based on our review, we conclude the trial court did not err or abuse its discretion in rejecting the testimony of Matthews, and we adopt the trial court's reasoning in this regard.

WSRC next contends that various findings and conclusions of the trial court are incorrect, erroneous, and not supported by credible evidence. ***See*** Brief of Appellant, at 47-50. In reviewing these allegations, we note that most of them do not include pertinent citations to the certified record, as required by the Pennsylvania Rules of Appellate Procedure. ***See*** Pa.R.A.P. 2119(c) (stating that, if reference is made to the pleadings, evidence, charge, opinion or order, or any other matter appearing in the record, the argument must set forth, in immediate connection therewith, or in a footnote thereto, a reference to the place in the record where the matter referred to appears). Thus, we find those issues waived. ***See Commonwealth v. Dodge,*** 859 A.2d 771, 774 (Pa. Super. 2004); ***Kaplan v. O'Kane,*** 835 A.2d 735, 742 (Pa. Super. 2003). Even if those issues were not waived, however, we would conclude that they have no merit for the reasons stated in the well-reasoned trial court Opinion. ***See*** Trial Court Opinion, 4/29/04, at 24-32.

WSRC makes the required citations to the record for his contention that the trial court erred in finding that WSRC transferred Hollingsworth to WEC in 1995. WSRC asserts that the evidence shows that Hollingsworth voluntarily resigned from WSRC and sought employment with WEC. We have reviewed WSRCs contention in this regard, and conclude that it is without merit for the reasons stated by the trial court in its Opinion. ***See*** Trial Court Opinion, 4/29/04, at 25.

The next argument raised by WSRC is that the trial court erred in awarding Hollingsworth an extra $60.00 per month. We have thoroughly reviewed WSRC's argument on this issue, and conclude that it is without merit for the

reasons stated by the trial court in its well-reasoned Opinion. ***See*** Trial Court Opinion, 4/29/04, at 32-35.

Finally, WSRC alleges that the trial court erred in awarding Hollingsworth a lump sum payment of benefits pursuant to the Delta Plan. WSRC contends that such award was unsupported by the evidence and exceeded the authority of the Court to award equitable relief. WSRC cites the ERISA Act, 29 U.S.C.A. § 1132(a)(1)(B), for this proposition, but no other authority.

After reviewing WSRC's contention, we conclude it has no merit. We find nothing in section 1132(a)(1)(B) to preclude a lump sum award. The reasons set forth by the trial court adequately justify its decision to award Hollingsworth a lump sum, and we rely on the reasoning of the trial court in regard to this issue. ***See*** Trial Court Opinion, 4/29/04, at 35-37.

Judgment affirmed.

Judgment Entered:

/s/ Eleanor R. Valecko
Deputy Prothonotary

DATE: April 22, 2005

APPENDIX B

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

STEPHEN D. HOLLINGSWORTH,	) GD 99-18449
Plaintiff,	)
vs.	)
WESTINGHOUSE ELECTRIC CORPORATION and WESTINGHOUSE SAVANNAH RIVER CORPORATION,	)
Defendants.	) FRIEDMAN, J.

ORDER OF COURT

AND NOW, to-wit this 25th day of November 2003 after consideration of Defendant's Motion for Post-Trial Relief, it is hereby ORDERED that said Motion is DENIED.

It is further ORDERED that Plaintiff's Motion to Mold Verdict to add counsel fees is GRANTED in full, and the verdict is increased by $72,642.50 to the molded amount of $255,423.50, and the Prothonotary is hereby directed to enter judgment in favor of Plaintiff accordingly.

By the Court

/s/ Friedman, J

APPENDIX C

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

STEPHEN D. HOLLINGSWORTH, Plaintiff,	) CIVIL DIVISION
v.	) GD No. 99-18449
WESTINGHOUSE ELECTRIC CORPORATION and WESTINGHOUSE SAVANNAH RIVER CORPORATION, Defendants.	)

ORDER

AND NOW, this 27 day of July, 2000, it is hereby ORDERED, ADJUDGED and DECREED that the Preliminary Objections Raising Questions of Fact filed by Westinghouse Savannah River Company are ~~GRANTED and the complaint filed by Plaintiff Stephen D. Hollingsworth is dismissed with prejudice as to Westinghouse Savannah River Company based on lack of personal jurisdiction.~~ [denied. /s/ Paul Lutty]

/s/ Paul Lutty, J.
Paul Lutty

APPENDIX D

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

STEPHEN D. HOLLINGSWORTH, Plaintiff,	) CIVIL DIVISION
v.	) Case No.:
WESTINGHOUSE ELECTRIC CORPORATION and WESTINGHOUSE SAVANNAH RIVER CORPORATION, Defendants.	) GD No. 99-18449

OPINION

This is an appeal by Defendant Westinghouse Savannah River Corporation ("WSRC"). WSRC first claims that this Court erred by denying WSRC's preliminary objections challenging this Court's personal jurisdiction over it. In this Opinion, this Court will only address the issue regarding the preliminary objections because that issue is the only matter that was before this Court. For that reason, this Opinion should be read in conjuncture with the Opinions filed separately by the Honorable Frank J. Lucchino and the Honorable Judith L.A. Friedman.

Pennsylvania courts may exercise two types of personal jurisdiction over a non-resident corporate defendant: (1) specific jurisdiction, based upon the specific acts of the defendant giving rise to the cause of action; or (2) general jurisdiction, based upon the defendant's general activity with in the Commonwealth. *See* 42 Pa. Cons. Stat. §§ 5322(a) & (b), 5301(a)(2) (West Supp. 2000); *Kubik v. Letteri*, 532 Pa. 10, 16-17, 614 A.2d 1110, 1113-14 (1992). The exercise of personal jurisdiction under Pennsylvania

law is subject to the limits prescribed by the United States Constitution. *See id.*; 42 Pa.Cons.Stat. § 5322(b). However, a Pennsylvania court may assert personal jurisdiction over a non-resident defendant if the plaintiff can prove that the defendant is the "alter ego" of a Pennsylvania corporation. *See Botwinick vs. Credit Exchange, Inc.*, 419 Pa. 65, 72, 213 A.2d 349, 354 (1965).

After reviewing the Briefs filed on behalf of the parties, oral argument, and relevant caselaw, this Court found that WSRC was an "alter ego" of Defendant Westinghouse Electric Corporation, which is a Pennsylvania corporation; and therefore, jurisdiction over WSRC was properly asserted. Accordingly, WSRC's appeal should be dismissed in this regard.

BY THE COURT:

February 13, 2004 By: /s/ Paul F. Lutty
Honorable Paul F. Lutty, Jr.

APPENDIX E

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

STEPHEN D. HOLLINGSWORTH, Plaintiff, vs. WESTINGHOUSE ELECTRIC CORPORATION and WESTINGHOUSE SAVANNAH RIVER COMPANY, Defendants.	) GD 99-18449)) FRIEDMAN, J.

OPINION

INTRODUCTION

Defendant Westinghouse Savannah River Company (hereinafter, "WSRC") has appealed from this Court's Order dated November 25, 2003, in which WSRC's Motion for Post-Trial Relief was denied, the verdict was molded to add counsel fees, and the Prothonotary was directed to enter judgment in favor of Plaintiff in the amount of $255,423.50. WSRC has also sought review of earlier pre-trial Orders entered by the Honorable Paul F. Lutty, Jr. and the Honorable Frank J. Lucchino of this Court. Those judges have filed their own Opinions addressing the issues raised by their Orders.

The crucial factual dispute for the trial was whether or not Plaintiff's receipt of a particular vested retirement benefit was conditioned on his actually being employed at WSRC at the time he retired. The document at issue is an Inter-Office Memorandum dated June 28, 1993

(hereinafter, the June 28, 1993 memo). The questions are what WSRC intended to convey and what Plaintiff would reasonably have understood by the phrase in the crucial June 28, 1993 memo, "At the time of retirement of a WSRC employee transferred to this site from another Corporation location." Defendant contends that only part of this phrase, "At the time of retirement of a WSRC employee," is significant and builds its argument on the truncated phrase. WSRC contends that Plaintiff had to be employed *at WSRC* on the day he retired in order to receive his vested benefit at issue. The Court essentially concluded that while the entire phrase *is* unambiguous, the *meaning is not* as WSRC contends. The Court further concluded, although possibly not in so many words, that the meaning Defendant attributes to the phrase is *unreasonable*, especially given the other circumstances.[1]

The parties agreed to almost all the facts pertinent to the dispute, and the case ultimately rested on whose witnesses were credible regarding the events surrounding the creation and implementation of the benefit, which is referred to herein as either the Delta Payment or the Delta Plan. The most important area of credibility is the *intent* of WSRC on June 28, 1993, when the crucial memo was sent. There was also a substantial amount of documentary evidence regarding the events at issue.

The case appeared to be somewhat complicated by the fact that, as Judge Lucchino ruled, ERISA governs much of the dispute even though WSRC failed to comply with

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[1] Parol evidence was allowed nevertheless, so the issue of ambiguity was not expressly averted to and no evidence was excluded by operation of the parol evidence rule.

ERISA's requirements applicable to the Delta Plan. However, most of the pertinent law involves ordinary principles of interpretation. ERISA, in the end, applies mainly to the issue of counsel fees, which the Court concludes could also have been justified under 42 Pa. C.S.A. §2503(9). In other words, even if Judge Lucchino's ruling were found to be incorrect, the result would be the same, except that Plaintiff might then also be entitled to punitive damages.

The Court concluded that WSRC's position was a subsequent interpretation not reflective of the parties' actual intent as of June 28, 1993, that the position was taken in bad faith, and, after argument on Post Verdict Motions, that Plaintiff was entitled to judgment in the amount of $255,423.50, which includes both damages and counsel fees.

FACTUAL BACKGROUND

The Court had made a number of findings of fact in its Memorandum in Support of Verdict. Those findings are repeated herein, below. Note that the various exhibits in evidence are designated by a number preceded by "P" for Plaintiff Exhibit, "D" for WSRC Exhibit, "Kelly" for George Kelly Deposition Exhibit, or "Matthews" for Paul Matthews Deposition Exhibit.

1. Plaintiff was employed by Defendant Westinghouse Electric Corporation (WEC) from August 1973 to August 1989, and then again from August 1995 to November 30, 1996, when he elected to take early retirement.

2. From August or September 1989 to August 1995 Plaintiff was employed by WSRC under the circumstances further described below.

3. For some lengthy time prior to 1989 the United States Department of Energy (DOE) had a nuclear facility on the Savannah River in Georgia, which was operated by the builder of the facility, Du Pont Company, a GOCO (Government Contractor).

4. After a series of reactor mishaps, the DOE chose WEC to replace the Du Pont Company as the operator of the site.

5. WEC formed a new entity, WSRC, for the sole purpose of operating the DOE's Savannah River nuclear facility as the DOE's new GOCO.

6. WSRC was a wholly owned subsidiary of WEC during the time period pertinent to the instant dispute (1989-1993).

7. WEC and its subsidiaries including WSRC were regarded as being in the same "controlled group." (Kelly Deposition, pp. 19-20.)

8. Prior to 1995 or 1996, employees of a member of the controlled group could earn credit towards retirement and towards their "standard" qualified pension by working at any member of the controlled group.

9. When WEC fell upon hard times around the time Plaintiff retired, WSRC became independent of WEC although it continued to operate the Savannah River nuclear facility for the DOE, and does so at the present as well.

10. WSRC has no other business than operating the DOE Savannah River nuclear facility.

11. As a condition for giving the operating contract to WEC and WSRC, the DOE insisted that the facility be staffed with WEC's most highly qualified and experienced nuclear engineers and other personnel.

12. WEC also wanted to keep its "nuclear team" intact in case the demand for nuclear reactors picked up again in the future.

13. It is undisputed that Plaintiff was chosen to go to WSRC because he was a highly qualified nuclear engineer and an important member of WEC's nuclear team.

14. It is undisputed that Plaintiff's job performance throughout his career, at WEC and WSRC, has been exemplary.

15. At the time Plaintiff and the other WEC employees (hereinafter referred to collectively as the Transferees) were chosen for the WSRC assignment, they were assured that the amount of their WEC pensions would be unaffected by the transfer.

16. WSRC by its subsequent conduct has admitted that this representation was an important factor in the Transferees' decisions to accept the transfer.

17. After the transfers began to take effect, some of the Transferees (not including Plaintiff) noticed that the representations made about there being no effect on the Transferees' WEC pensions were not true and brought this to the attention of WEC and WSRC.

18. After investigation, it had become apparent to WSRC by 1991 (if not earlier) that, because of the quirks of WEC's qualified pension plan, certain of the Transferees would receive less money from their pensions because of their transfer to WSRC.

19. The reason for the difference was that the WEC pension plan tended to reward longevity of employment once it was achieved and did so by increasing the employer's annual contributions as an employee such as Plaintiff neared retirement age, whereas the WSRC pension plan called for level employer contributions, without regard to longevity.

20. During the years certain Transferees were transferred away from WEC, those larger contributions were not made to their WEC plans; instead lower contributions were made into the WSRC pension plans.

21. It was recognized that this could result in a combined pension (from WEC plus WSRC) for some Transferees that was lower than if they had remained at WEC.

22. This difference came to be known as the "delta."

23. The delta varied for each individual depending upon his or her age, years at WEC, years at WSRC, and expected date of retirement.

24. For Transferees near the age of retirement at the time of their transfer to WSRC (58-65 being then regarded as "standard" retirement age), the delta was projected to be significant, while for those who were younger at the time of their transfer to WSRC, the delta was expected to be minimal.

25. WSRC recognized that in order to be sure that these crucial employees, the Transferees, would remain at WSRC as both WEC and the DOE desired, it had to solve the delta problem which was created in 1988-89 when the negligent misrepresentations regarding the effect on pensions were made.

26. Plaintiff (and presumably most of the other Transferees) first became aware of the possible adverse impact on his WEC pension in April 1992, via a memo sent to "All Westinghouse Transferees" from

Paul W. Matthews, WSRC's Manager, Benefits and Systems. See P-6.

27. After much discussion with the Transferees and much consultation with Buck Consultants, WEC's and WSRC's pension advisors, WSRC came up with a proposal to correct the delta problem.

28. George E. Kelly, a consulting actuary who worked for Buck Consultants, was among the Buck personnel who handled WEC and WSRC's employee benefit issues including pension plans.

29. Mr. Kelly had suggested a vastly different approach (hereinafter, Cash Bonus) to correcting the delta problem because he felt a pension benefit approach was too complicated, too unpredictable and potentially too costly. (Kelly Deposition, pp. 29-34.)

30. The Cash Bonus approach initially proposed by Mr. Kelly would have paid each Transferee an annual bonus based on the loss to the WEC plan he or she had sustained during that calendar year. As a result, if a Transferee left WSRC, there would have been no uncompensated delta amount outstanding.

31. In fact, WSRC's conduct with regard to Plaintiff appears to be closer to the Cash Bonus approach than it is to the pension plan promised by the June 28, 1993 memo (except that no annual Cash Bonus was paid).

32. WSRC, for reasons that are not in evidence (or, if contained therein were not brought to the Court's attention), rejected its advisor's concerns about a pension approach and proposed in a June 28, 1993 memo that "any shortfall will be paid from [a] non-qualified [pension] plan that we will establish for such purpose. The Trustee for this plan will be NationsBank who also is the Trustee for our qualified pension plan.

Therefore, it is anticipated that the monthly annuity to cover the shortfall portion [i.e. the delta] will be included in [an eligible Transferee's] normal pension check, rather than receiving it in a separate check." (P-9, page 2.)

33. WSRC also was trying in 1993 to obtain the agreement of the DOE to help fund the ultimate cost of the proposed correction.

34. DOE eventually agreed to pay two-thirds of the cost.

35. The proposal was relayed to the Transferees in an Inter-Office Memorandum dated June 28, 1993, from Paul W. Matthews, who still held the title of Manager of WSRCs Employee Benefits and Systems. (See P-9. See also, D-13, which is identical to P-9 but which also has a Sample Calculation of Monthly Pension Benefit inadvertently omitted from P-9.)

36. The June 28, 1993 Memorandum is admitted by WSRC to be the only document related to the benefit plan now in dispute.

37. None of the other steps set forth in the June 28, 1993 document were taken and no other documents were adopted or executed to implement the proposal which, based on Judge Lucchino's ruling, is nevertheless to be regarded for purposes of this trial as sufficient under ERISA to constitute a summary of the benefit at issue.

38. It is undisputed for purposes of this trial that under ERISA the June 28, 1993 document is to be considered a Summary Plan Description (SPD).

39. The interpretation of the June 28, 1993 document is the ultimate issue at this trial.

40. Plaintiff remained at WSRC until August 1995, around the time when WSRC was reducing its staff

(which had gone from 7,000 to 20,000 shortly after Du Pont was replaced in 1988-89) because DOE no longer needed the facility to operate at the high levels necessitated by the Cold War.

41. Plaintiff was then sent back to WEC on an "Inter Works Requisition" (IWR) whereby he continued to be on the WSRC payroll.

42. Subsequently, Plaintiff was transferred back to WEC as of August 1995 and was no longer considered an employee of WSRC.

43. Although counsel for WSRC referred in his opening to exit documents having been signed by Plaintiff when he left WSRC, the Court is unsure where these may be found among the documents in evidence; since no reference is believed to have been made to those in closing, the Court assumes they have little relevance to the existence or not of The Requirement.

44. According to Mr. Matthews, Bill Sokolo conducted exit interviews. (Matthews Deposition 1, pp. 124-25. See also, pp. 148-98.)

45. By 1996, the financial and strategic situation of WEC had changed dramatically, resulting in its offering Plaintiff an early retirement package which he ultimately accepted.

46. Plaintiff retired from WEC as of November 30, 1996 and received qualified pension benefits based on a total of 17 years at WEC (16 years before going to WSRC and one more year after leaving WSRC).

47. Plaintiff also received a qualified pension from WSRC for the 6-year period he was employed there.

48. Neither of those qualified pension payments are in dispute.

49. In addition to his WSRC pension, Plaintiff was informed by WSRC that the calculation for his "Delta Benefit" resulted in his being entitled to an additional payment from WSRC of $609 per month.

50. Plaintiff believed that he was entitled to an additional $60, or $669 per month for the delta, based on his understanding of the relationship between the WEC and WSRC pension plans.

51. When he brought this discrepancy to the attention of WSRC, which by this time had been severed from WEC and was no longer affiliated with it in any way, he was told by John Greenquist that he was not entitled to any payment under the Delta Plan, his Delta Payments of $609 per month from WSRC were stopped, and the instant litigation followed.

52. The Court funds the testimony of Mr. Greenquist (called by WSRC and physically present in Court) not to be credible.

53. Mr. Greenquist was not even an employee at WSRC during the time period relevant to the drafting of the June 28,1993 memorandum.

54. His supposed understanding is not reliable in any case, being allegedly based on statements made to him by Mr. Matthews, who the Court disbelieves based on the circumstantial evidence that fails to support Mr. Matthews' assertions.

55. Mr. Matthews was called by Plaintiff, by deposition, and testified that, when asked, he orally told some Transferees (but admittedly not Plaintiff) that they had to be employed by WSRC at the time of retirement in order to qualify for the Delta Benefit. This testimony is not consistent with the other evidence in the case, and the Court doubts that it is true.

56. Mr. Matthews is put forth by WSRC as a witness having no financial interest in the case, having retired with a satisfactory pension, and therefore being reliable.

57. The Court finds that he is less than reliable because he is the person most obviously at fault for the ERISA violations that permeate the instant matter, although his superiors, who did not testify, may very well deserve blame as well.

58. Being the person at fault or left holding the bag, Mr. Matthews has a great interest in being vindicated; he simply has a personal issue of self-esteem and pride rather than a concern for his financial situation.

59. Mr. Mathews drafted the June 28, 1993 memo in which he promised on behalf of WSRC that a non-qualified plan would be established and implied that the proper ERISA documents would follow, which documents would, *inter alia*, set out in orderly detail the requirements for eligibility for a Delta Payment.

60. Mr. Matthews is not believed to be by nature a dishonest man and the Court does not want to suggest this; however, he is not to be believed when he says, in effect, that it was obvious from that one crucial phrase, [At the time of retirement of a WSRC employee transferred to this site from another Corporate location"], that one of the requirements for Delta Benefit eligibility was that a Transferee be employed by WSRC at the time of his retirement.

61. There is no reference to such a requirement in any of the other documents related to the delta problem: nowhere does any writing by any person suggest that for this particular payment such a requirement existed or was contemplated as of June 28, 1993.

62. Furthermore, it is highly unusual if not illegal for a *vested* benefit from one employer to require employment by that employer in order to receive it, yet this is what Mr. Matthews now says should have been obvious to Plaintiff and the other Transferees when they received his June 28, 1993 memo.

63. The Delta Benefit was designed to correct a big mistake made by WEC and WSRC for highly important and valued Transferees such as Plaintiff, a mistake which affected the Transferees immediately upon their agreeing to transfer to WSRC and which would diminish only in certain circumstances which were statistically calculable but not individually foreseeable. (See Kelly Deposition, p. 80, l. 25 where he states, amusingly but relevantly, "I'm an actuary, not a fortuneteller.")

64. The right to a Delta Benefit undisputedly vested immediately (i.e. no later than the date of the memo, June 28, 1993) in each Transferee, subject only to a calculation that would be made at the time they retired and became eligible for a WEC pension benefit.

65. Until the WEC pension payment was actually calculable for an individual Transferee such as Plaintiff, the amount of his or her Delta Benefit could not be calculated.

66. This is because the Delta Benefit was to represent the difference in the WEC pension payment between a person who spent X years solely at WEC or a similarly-situated Transferee who spent the same X years at both WEC and WSRC.

67. According to the June 28, 1993 memo, a "shortfall [the Delta Payment] must be $25 or more" at the time of retirement.

68. So long as a Transferee from WEC had arrived at WSRC between 1989 and June 1991 he or she was potentially eligible for a Delta Payment if the loss to the WEC pension was at least $25.00 per month.

69. It is undisputed that any particular Transferee's actual Delta Payment could not be accurately calculated prior to the actual date of retirement.

70. The Sample Calculation provided by Mr. Matthews for WSRC and probably prepared by Buck Consultants, shows an employee with a Monthly Shortfall (Delta) of $573 per month. D-43, 3rd page.

71. This is probative of the fact that Plaintiff had no reason to suspect that WSRC's calculation of his Monthly Shortfall of the only slightly higher amount of $609 per month was anything other than correct (except for the $60 discrepancy claimed by Plaintiff which is a separate issue).

72. The Transferees, including Plaintiff, reasonably could have believed from the June 28, 1993 memo that the potentially substantial damage to their WEC pension would be made up by the Delta Payment.

73. At the time WSRC caused Mr. Matthews to send the June 28, 1993 memo, WSRC also believed that the immediate damage to the Transferees would either disappear over the course of a longer employment or would be made up by payment of the Delta Payment for those with a shorter period of employment at WSRC.

74. Plaintiff was one of those affected by a shorter period of employment with WSRC.

75. Mr. Kelly, who was called by Plaintiff and whose testimony was taken by deposition is the most reliable of the three witnesses affiliated with WSRC but called by Plaintiff. (The other two WSRC witnesses

called by Plaintiff were Paul Matthews and Peter J. McCormick, Buck Consultants)

76. Mr. Kelly's testimony about events well after June and July 1993 and after WSRC decided in 1996 not to pay Plaintiff what it had previously acknowledged was the Delta Payment he was due is not especially relevant to the question before the Court.

77. However, Mr. Kelly's testimony is highly relevant and quite reliable regarding the events that led up to the June 28, 1993 memo, as is his testimony regarding what was expected to follow from that memo.

78. On June 29, 1993, one day after WSRC sent the Transferees the memo of June 28, 1993, Mr. Kelly sent a letter to Eddie Wilcox of "NationsBank Trust," with a copy to Paul Matthews of WSRC. See P-11.

79. The purpose of Mr. Kelly's letter was to alert NationsBank to the fact that WSRC was "establishing a non-qualified pension plan effective July 1, 1993 to provide benefits for certain individuals which cannot be provided under the WSRC/BSR, Inc Pension Plan due to coverage and discrimination restrictions under the Internal Revenue Code." See P-11.

80. Mr. McCormick, who also worked for Buck Consultants at the time the delta problem was discovered and solutions were being sought, testified in a very limited fashion, also by deposition. His main testimonial function was to authenticate the draft Delta Plans that were never enacted after the June 28, 1993 memo which had suggested that a formal plan would be enacted.

ISSUES RAISED ON APPEAL

In response to this Court's Order of January 5, 2004, WSRC filed its Concise Statement of Matters Complained of on Appeal, raising six main issues which we briefly paraphrase as follows:

1) That it was error to deny WSRC's Preliminary Objections challenging the Court's personal jurisdiction over it. (This issue relates to Judge Lutty's Order.)

2) That it was error to permit Plaintiff to proceed with an ERISA claim. (This relates to Judge Lucchino's Order. The undersigned denied WSRC's Motion for Summary Judgment based on that Order. WSRC claimed that Plaintiffs Complaint failed to state a claim under ERISA and that the statute of limitations barred the ERISA claim now on appeal.).

3) That it was error to interpret the June 28, 1993 memo (the only "plan document" ever drafted) as requiring payment of a supplemental pension benefit to Plaintiff, for various reasons. (This relates to rulings of the undersigned and will be discussed in detail below.)

4) That it was error to award an extra $60.00 per month to Plaintiff. (This relates to rulings of the undersigned and will be discussed below.)

5) That it was error to award Plaintiff a lump sum payment for future payments under the Delta Plan. (This relates to rulings of the undersigned and will be discussed below.)

6) It was error to grant Plaintiffs motion to add attorney's fees. (This relates to rulings of the undersigned and will be discussed below.)

1) IT WAS NOT ERROR TO OVERRULE WSRCS PRELIMINARY OBJECTIONS CHALLENGING THE COURT'S PERSONAL JURISDICTION OVER IT.

This issue relates to the Honorable Paul F. Lutty, Jr.'s Order denying WSRC's preliminary objections challenging the Court's personal jurisdiction over it. Reference should be made to Judge Lutty's Opinion dated February 13, 2004. There will be no further discussion herein.

2) IT WAS NOT ERROR TO PERMIT PLAINTIFF TO PROCEED WITH AN ERISA CLAIM.

WSRC's second issue raised in its Concise Statement of Matters Complained of on Appeal reads as follows in its entirety: "The Court erred in permitting Plaintiff to proceed with a claim under the Employee Retirement Income Security Act ("ERISA"), when no claim under ERISA was asserted by Plaintiff in his initial complaint, and Plaintiff did not seek leave to add such a claim to this case until after the expiration of the statute of limitations applicable to such claim."

Based in large part upon Judge Lucchino's ruling, we denied WSRC's Motion for Summary judgment, in which it had argued that Judge Lucchino's ruling required Plaintiff to file a *new* cause of action under ERISA, which would then be time-barred. The undersigned concluded that the instant action was not barred by the statute of limitations since Judge Lucchino had already ruled that the original complaint pled sufficient facts to state a claim under ERISA. *See* the Orders dated February 15, 2002 and October 2, 2002 of the Honorable Frank J. Lucchino, and his Opinion dated February 26, 2004, for a further discussion. *See also* the

Memorandum in Support of Order of the undersigned, dated December 13, 2002, denying WSRC's Motion for Summary Judgment.

Since ordinary rules of construction govern most of the issues raised on appeal, even if Judge Lucchino were in error, such error would be harmless. The result would largely be the same whether ERISA applies or not.

3) IT WAS NOT ERROR TO INTERPRET THE JUNE 28, 1993 PLAN DOCUMENT AS REQUIRING PAYMENT OF A SUPPLEMENTAL PENSION BENEFIT TO PLAINTIFF.

The issue of interpretation of the June 28, 1993 memo was the crux of the case, and is divided by WSRC into various sub-issues, mostly involving credibility of witnesses and certain inferences drawn by the Court.

Issue 3(A) attacks the Court's interpretation of the phrase at issue, 3(B) attacks the Court's finding that Paul Matthews' testimony was self-serving, inconsistent with the contemporary documentary evidence, and not credible, 3(C) has nine sub-issues which raise other issues of credibility and attack inferences made by the Court.

The Court had available to it many pertinent documents, including drafts of the Delta Benefit plan that WSRC eventually declined to adopt, contrary to its expressed intent in the June 1993 memo. The Court also had available the deposition testimony of witnesses who were actually involved with WSRC's efforts to restore to persons such as Plaintiff the benefits lost when Plaintiff and others joined WSRC, leaving WEC at the request of WEC and WSRC. In addition, it heard the "live" testimony of

John Greenquist and Beverly Adams, called by WSRC, as well as the testimony of Plaintiff himself.

It is well-settled that the findings of a fact-finder are not to be disturbed on appeal so long as there is an evidentiary basis for those findings. In the instant case the Court's finding that certain testimony, whether taken by deposition or heard in court, was not credible is well supported by the circumstantial documentary evidence. It is also well-settled that the Court as factfinder is free to disbelieve a witness's testimony. *See In re Appeal of Pesante,* 82 Pa.Commw. 242, 476 A.2d 474 (1984). In addition, it is well-settled that if inferences drawn by the factfinder flow from the circumstantial evidence presented, those inferences should stand. *Commonwealth v. PBS Coals, Inc.,* 112 Pa.Commw.1, 534 A.2d 1130 (1987) and *Blue Anchor Overall Co. v. Pennsylvania Lumbermens Mutual Ins. Co.,* 385 Pa. 394, 123. A.2d 413 (1956).

3(A) THE COURT CORRECTLY INTERPRETED THE JUNE 28, 1993 MEMO.

WSRC strains both English grammar and common sense when it contends that Plaintiff was only to receive the Delta Benefit if he was still employed by WSRC on the day he retired. Furthermore, the evidence overwhelmingly demonstrates the contrary. One of WSRCs consultants had even warned WSRC of the possibility of an excessive cost if it adopted the method it eventually chose. WSRC nevertheless decided to take the risk that some Transferees would be entitled to a high Delta Payment. After June 28, 1993, as its consultants were preparing the documents necessary for the Delta Benefit, someone at WSRC (probably Mr. Matthews) belatedly understood the extent of the mistake. The documents were never finalized, documents

drafted were never adopted, and fingers undoubtedly were crossed. Several years later, when Plaintiff retired, WSRC first paid him as promised in the June 28, 1993 memo. It was only when Plaintiff questioned the $60 omission that Mr. Matthews' replacement John Greenquist, declared that Plaintiff was entitled to no Delta Payment at all. WSRC then tried to change the past and justified its action by contorting the meaning of the phrase at issue.

On appeal, WSRC has attempted to justify its interpretation by truncating the relevant quotation from the June 28, 1993 memo as though the complete phrase being interpreted were only "At the time of retirement of a WSRC employee." See Statement, Item 3(A). However, the full quote pertinent to the dispute is "At the time of retirement of a WSRC employee transferred to this site from another Corporate location,. . . ." The correct reading is that "a WSRC employee transferred to this site from another corporate location" is what goes together and is what has been referred to by WSRC itself as a "Transferee." WSRC's tortured reading is contrary to English grammar and to its own usage at the time the promise was made.

3(B) THE TESTIMONY OF PAUL MATTHEWS WAS NOT CREDIBLE.

The Court's determination regarding the credibility of Paul Matthews is well supported by the evidence. The Court's inferences also flow naturally from the documents in evidence and the inconsistency of Mr. Matthews' testimony given the documents that had been drafted around June 28, 1993 and shortly thereafter. See Findings of Fact No. 55-62.

3(C) THE COURT'S FINDINGS WERE BASED ON THE EVIDENCE THE COURT FOUND CREDIBLE.

3(C)(1) THE DRAFTS OF PLAN DOCUMENTS WERE INDICATIVE OF WSRC'S INTENT AS OF JUNE 28, 1993.

In this part of its Statement of Matters Complained of on Appeal, WSRC suggests that it had never "seen" the Delta Plan documents drafted by its consultant and that therefore the documents are irrelevant to its intent. The documents may or may not have been "seen" by WSRC, but they were undisputedly prepared at the direction of WSRC based on its intent as of June 28, 1993. The Cash Bonus plan was the smarter solution to WSRC's problem, but was rejected, by Mr. Matthews or his superiors, in favor of a pension benefit which would only have its impact in the future. The cash bonus would arise every year as a present reminder of the initial pension mistake that induced the Transferees to leave WEC in the first place and lured them to WSRC. When WEC offered Plaintiff (and others) early retirement, WSRC realized that "the future is now." It then reneged on its promise to Plaintiff to give him a Delta Benefit, and it hung its hat on the hope that Plaintiff (and eventually a court) would be unable to discern the meaning of a modifying clause.

3(C)(2) WSRC MISSTATES OR MISUNDERSTANDS FINDINGS 41 AND 42.

Whether Plaintiff was transferred "by" WSRC or "from" WSRC is immaterial and was not the thrust of Findings No. 41 and 42. In fact, the Court does not even make the finding as stated by Defendant. The point was that Plaintiff first returned to WEC temporarily (remaining

on WSRC's payroll) and then left WSRC permanently, not being a WSRC employee after August 1995. Again, Defendant misquotes and then bases its argument on an inaccurate quotation.

This approach by WSRC is also a double-edged sword: the fact that it is reduced to such tactics emphasizes the fad that it is unable to dispute any of the Court's findings based on the *evidence*.

3(C)(3) THE DATE OF THE VESTING OF A BENEFIT IS NOT DETERMINED BY THE DATE THAT THE AMOUNT OF THE BENEFIT IS TO BE CALCULATED.

In item number 3(C)(3) of its Concise Statement of Matters Complained of on Appeal WSRC also criticizes the Court's Finding No. 62 that "it is highly unusual if not illegal for a *vested* benefit from one employer to require employment [at retirement] by that employer in order to receive [the benefit]." In effect, WSRC contends on appeal that because the *amount* of the benefit could not be calculated until retirement it should not be considered a *vested* benefit. It is axiomatic that difficulty or ease of calculation has nothing to do with whether or not a right is *vested*. In the instant case, based on virtually undisputed evidence, it is clear that Plaintiff had an absolute right *as of* June 28, 1993 to receive a Delta Payment *in the future*. Depending on circumstances at the time of calculation, the *amount* of the benefit could vary, even being as low as zero, but the *right* to the benefit was "fixed; accrued; settled; absolute."[2]

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[2] *See* Black's Law Dictionary 5th Ed., definition of "vested."

Far from being payable only if Plaintiff remained at WSRC *until retirement,* the Delta Benefit was intended to make sure Plaintiff and the other WEC employees remained at WSRC *beyond June 28, 1993.* It must be remembered that the non-inclusion of a valuable aspect of the WEC pension benefit in the WSRC pension benefit caused great dissatisfaction among the Transferees, raising a fear in WSRC that the Transferees would leave WSRC and thereby greatly impair WSRC's ability to perform its Savannah River Nuclear Plant contract for the Department of Energy. See Findings of Fact Nos. 11, 12, 15, 16, 17, 25, *inter alia.* That fear was why WSRC promised Plaintiff and the other Transferees the Delta Benefit in the first place. The mere fact that WSRC, through Paul Matthews and, possibly, his supervisors, chose later to avoid implementing the Delta Benefit in accordance with ERISA requirements does not mean that the benefit itself was not "vested." In addition, WSRC failed to cite any law or adduce any evidence for the proposition that a vested benefit can ever be divested, nor has it adduced any evidence showing circumstances that would permit the vested Delta Benefit to be divested in this case.

3(C)(4) & 3(C)(5) THE COURT'S FINDING THAT THE TESTIMONY OF MR. MATTHEWS, MR. GREEN AND MS. ADAMS WAS NOT CREDIBLE IS SUPPORTED BY THE EVIDENCE AND THEREFORE SHOULD NOT BE DISTURBED ON APPEAL.

Regarding the credibility of Paul Matthews, John Greenquist and Beverly Adams, the reasons the Court found their testimony not credible was previously set forth in the Memorandum in Support of Verdict. As to Mr.

Matthews, see Findings No. 55 to 62, *supra*. As to Ms. Adams, WSRC contends in Issue 3(C)(4) that the Court's refusal to credit her testimony was based solely on the "erroneous premise" that she was employed by WSRC. Although this idea of an "erroneous premise" is a red herring, we will address it briefly.

The evidence showed that Ms. Adams had been employed by WSRC directly until 1996 or 1997, when WSMS was spun off from WSRC. Ms. Adams testified that she was currently "self-employed as a human resources consultant" and that WSMS was one of her main clients (Trial Transcript, hereinafter "TTS," Vol. II, p. 112, IL 3-9). She clearly continues to have a connection with her former employer, WSRC.

However, this connection was *not* the "sole" reason why the Court refused to credit her testimony. The real problem the Court found with Ms. Adams' testimony was as stated in the Memorandum in Support of Verdict, "it was made by someone who suggests she was very much involved (because she was present at many meetings with [the Department of Energy] and Buck [Consultants]) yet she cannot point to anything other than supposed English usage to support her testimony."

As to John Greenquist, see Findings No. 51-54. He had no first-hand knowledge of any of the pertinent events.

It should also be remembered that both Ms. Adams and Mr. Greenquist were present in Court when they testified. Their demeanor was observed and they were disbelieved.

3(C)(6) IT IS IRRELEVANT TO THE INSTANT DISPUTE WHETHER OR NOT WSRC PAYS A DELTA PAYMENT TO OTHER TRANSFEREES. THE WITHDRAWAL OF PLAINTIFF'S DELTA BENEFIT IS WHAT IS AT ISSUE.

The assertion that 44 WSRC retirees are receiving a Delta Payment of some sort may or may not be true, but it is irrelevant to the issue of whether *Plaintiff* has properly been denied such a payment. Because only Plaintiff's case was before the Court, the fate of all other Transferees is not known. Plaintiff retired early; 44 other Transferees may have stayed at WSRC until retirement; the status of the remaining Transferees is not ascertainable by the Court, although WSRC's desperation suggests that there may be a lot of them with potential claims similar to Plaintiff's.

3(C)(7) THE COURT DREW PROPER INFERENCES FROM THE EVIDENCE REGARDING THE RELATIONSHIP OF WSRC AND WEC.

Another red herring appears in Item 3(C)(7) of WSRC's Statement of Matters Complained of on Appeal. WSRC attacks one of many bases the Court had for finding that Mr. Greenquist was not credible. The Court alluded to the fact that WSRC had been "severed from WEC" by the time Mr. Greenquist started working at WSRC. The Court had intended to suggest that in 1996 WSRC no longer had the incentive it had in 1991-1993 regarding honoring its June 28, 1993 promise of a Delta Payment. Whether or not WSRC and WEC were somehow still related because of a connection with CBS is irrelevant. Furthermore, the first mention of WSRC being a

subsidiary of CBS is in sub-issue 3(C)(7). The discrepancy is trivial in any case, since John Greenquist had no first-hand knowledge upon which to base his decision to stop Delta Payments to Plaintiff. See also Findings No. 4-8. What is clear from the *evidence* is that by 1996 when Mr. Greenquist on behalf of WSRC decided Plaintiff was not entitled to any Delta Benefit, WSRC no longer had the urgent need for the Transferees that it had in 1991-93.

3(C)(8) THE COURT PROPERLY INFERRED FROM THE EVIDENCE THAT THE PLAN DRAFTED FOR WSRC WAS NOT SENT BECAUSE WSRC NO LONGER INTENDED TO IMPLEMENT ITS PROMISE OF JUNE 28, 1993.

Regarding item 3(C)(8) in WSRCs Statement of Matters Complained of on Appeal, again, these are disputes regarding credibility and inferences, and do not constitute a basis for reversal. The point the Court intended to convey was its inference that Mr. McCormick never sent the draft plans to WSRC *because* WSRC had decided *not* to keep its promise regarding the Delta Plan. Certainly, there is *no* evidence that WSRC ever asked Mr. McCormick why the draft had not been sent nor that WSRC asked that it be sent.

It must also be remembered that WSRC had chosen to disregard the advice of Mr. Kelly to compensate Plaintiff and the other employees similarly situated with a cash bonus payment calculated annually rather than the pension approach WSRC later adopted. It was proper to infer that WSRC belatedly understood what Mr. Kelly meant and as a result decided to hope the problem would never surface. *See, also,* Findings of Fact 27-32.

3(C)(9) THE COURT PROPERLY INFERRED FROM THE EVIDENCE THAT WSRC, AS WELL AS WSMS, PARTICIPATED IN THE DECISION TO PROTECT THE DELTA BENEFITS OF THE TRANSFEREES WHO LATER MOVED TO SWIMS.

In Item 3(C)(9) of its Statement, WSRC also criticizes "the finding that WSRC had taken steps to protect the eligibility for benefits under the Delta Plan for 12 persons transferred to WSMS, which is contrary to the exhibits and testimony of Beverly Adams which show that WSMS, not WSRC, is the entity that took action to protect the delta eligibility of these transferees who otherwise would have lost entitlement to potential benefits under the Delta Plan as a result of the termination of their employment with WSRC."

The Court inferred, properly, that just as WEC and WSRC worked out a way to protect the pension status of Plaintiff and others when they were transferred to WSRC, so would WSRC and WSMS *together* have worked out how to deal with those delta-eligible transferees who left WSRC for WSMS. It was a proper and fairly obvious inference. In addition, the arrangement to protect the Delta Benefit of Transferees who moved to WSMS is indicative of the attitude of those Transferees even at that late date. In fact, the full details of a delta payment as WSRC now propounds would have again caused insurrection in the ranks. The Transferees would not have tolerated a Delta Benefit that was only tentatively theirs. From the evidence produced by WSRC itself, it was proper to infer that the Delta Benefit was still regarded as an important one by the Transferees who were moved to WSMS.

The reason the Delta Benefit was so important is that the WEC Plan encouraged longevity with WEC while the WSRC plan was not so designed. WSRC and Buck Consultants were well aware of this difference as were the Transferees. From this we can infer that the Transferees would not necessarily have been satisfied with a Delta Benefit that only made up for their lost WEC pension if they stayed at WSRC until the day they retired. We can then infer that WSRC, if acting in good faith and in its own interest as existed at the time, would not, on or before June 28, 1993, have intended to impose such a requirement since the Transferees would have remained discontent, an eventuality WSRC strongly wished to avoid at the time. See Findings No. 17-25.

It should be noted that according to Ms. Adams' testimony on behalf of WSRC, there are 12 Transferees still remaining at WSRC who were in the process of being transferred again to a new entity, WSMS, which is related to WSRC (but not to WEC). WSRC and WSMS took special steps to ensure that those 12 persons retain the June 28, 1993 Delta Benefit. A proper inference was that for people it values, WSRC will honor its June 28, 1993 promise, while ignoring the same promise for those such as Plaintiff who no longer suit its purpose.

The Court's reading of the proposal (D-28) for the re-transferred 12 did not reveal an express requirement regarding the place of employment at retirement. It seems fairly clear that the Delta Benefit vested no later than June 28, 1993 for these people as well. The only difference appears to be that these 12 are still necessary to WSRC and its new Controlled Group, WSMS, and Plaintiff is retired and of no further use to WSRC or WSMS.

In summary, there is no merit to any of WSRC's contentions set forth in Item 3 of its Statement of Matters Complained of on Appeal.

4) IT WAS NOT ERROR TO AWARD AN EXTRA $60.00 PER MONTH TO PLAINTIFF.

As a part of the verdict rendered on June 17, 2003, we concluded that Plaintiff was entitled to the $10 per month supplement for each of the six years that he was *not* at WEC. WSRC argues that this was error "given (i) the undisputed testimony that he elected a lump sum under the WEC Plan, thereby rendering the supplemental benefit under the Westinghouse Electric Corporation plan irrelevant to the calculation of Delta; (i) the unrebutted testimony of Mr. Greenquist that supplemental pension payments under the Westinghouse Electric Corporation plan are not considered in calculating the Delta; and (iii) the absence of any evidence suggesting that the Delta calculation, which yielded a $609.00 benefit, initially sent to Mr. Hollingsworth included the supplemental benefit in calculating the amount of pension which Mr. Hollingsworth would have been entitled to under the WEC plan." (WSRC's Statement of Matters, Issue 4.)

WSRC's first and third reasons were addressed in this Court's Memorandum in Support of Verdict dated June 17, 2003, at pages 23 through 26. That discussion is substantially reiterated below for convenience.

Regarding the issue of whether Plaintiff is entitled to the $10 per month supplement for each of the six years that he was *not* at WEC, WSRC's position is that Plaintiff would only have gotten that additional $60 from WEC if he did *not* elect a lump sum payment *of his WEC pension.*

Since Plaintiff did elect a lump sum from WEC, WSRC argues the $60 is not payable under the Delta Plan either. Plaintiff's position is that the Delta Benefit was to be *calculated* based on the *annuity value* of the WEC plan and not on its lump sum value. Therefore, the annuity value *of the WEC plan* would have included an additional $60 per month had Plaintiff never transferred to WSRC.

The Court found that Plaintiff's position was more probably than not the result intended by WSRC when it drafted the June 28, 1993 memo. WSRC deprived itself of the opportunity to clarify this point when it declined to adopt a final written Delta Plan. However, going by the limited wording available, the Court finds that WSRC only considered paying a monthly Delta Benefit and not a lump sum. WSRC also only proposed to calculate the Delta Benefit once the *monthly* WEC pension payment was established. WEC was the only source for what that monthly payment would be. We know from the documents related to the WEC plan that Plaintiff's *monthly* WEC pension payment *should* have included $170 per month ($10 per month per each of Plaintiff's 17 years of service at WEC). We also know that because Plaintiff spent six years at WSRC as a Transferee, he lost the right to an additional six years worth of the $10 per month from his WEC plan.

The admitted purpose of the Delta Plan was to make up the shortfall for Transferees who "would have received greater pensions had they continued in the Corporate [i.e., WEC] plan until retirement." (D-13, 1st paragraph.) The major part of that shortfall is reflected in the $609 monthly Delta Payment originally calculated by WSRC and paid to Plaintiff for six months or so. However, it is undisputed that the additional $60 amount would have

been included in a monthly payment from the WEC plan had Plaintiff spent his entire 23-year career at WEC instead of agreeing to go to WSRC for the six years he stayed there. The $60 is also an amount Plaintiff "lost" from the value of the WEC monthly payment which WSRC itself set as the starting point for its calculations. By the preponderance of the evidence, the Court properly found that Plaintiff had proven that he was entitled to the additional $60 per month.

As to WSRC's contention in Item 4(ii) of its Statement of Matters Complained of on Appeal that it was error to award Plaintiff the supplement because of "the unrebutted testimony of Mr. Greenquist" the fact that testimony may be unrebutted does not necessarily mean that it must be believed by the finder of fact (in this instance, the Court). *See, e.g., In re Appeal of Pesante*, 82 Pa. Commw. 242, 476 A.2d 474 (1984). We did not find Mr. Greenquist's testimony to be credible on the method of calculating the Delta Payment or, frankly, on most other matters. As previously noted, he was not even employed by Defendant in or around June 1993. He was not hired by WSRC until July 1994, a year after all the events pertinent to the Delta had occurred. To the extent he claimed to know anything about the Delta Benefit, he admitted that his source was Paul Matthews, a witness the Court found self-serving and not worthy of belief.

5) <u>IT WAS NOT ERROR TO AWARD PLAINTIFF A LUMP SUM PAYMENT FOR FUTURE PAYMENTS UNDER THE DELTA PLAN.</u>

In Item 5 of its Statement of Matters Complained of on Appeal, WSRC argues that it was error to award Plaintiff a lump sum payment for future payments "in

light of the undisputed evidence that a lump sum option is not available under any WSRC pension plan; the language of the June 28, 1993 memo describing the Delta Plan, which expressly provides that payments under that plan will be via a monthly check; and the undisputed testimony of Mr. Greenquist that no participant under the Delta Plan has ever received benefits in the from of a lump sum, and therefore paying a lump sum to Mr. Hollingsworth would place him in a position better than that of any other plan participant." (WSRCs Concise Statement, 5.)

This issue was briefly addressed in this Court's Memorandum in Support of Verdict dated June 17, 2003. The paragraph addressing this issue is quoted here in its entirety:

> *As to the Plaintiffs entitlement to a lump sum payment of his Delta claim, the Court concludes that he is so entitled. Had WSRC funded a Trust from which annuities would be purchased as eligible Transferees retired, then a lump sum might not be warranted: the Court could simply direct the Trustee to purchase the appropriate annuity. However, since the Trust was never established, Plaintiff is entitled to a lump sum equal to the present value of the monthly Delta payment over Plaintiff's statistical life span. That amount has already been stipulated to.*

(Memorandum in Support of Verdict, p. 23.)

At oral argument on the Motion for Post-Trial Relief, counsel for WSRC maintained that the Court went beyond

the remedies permitted under ERISA at §502(a)(1)(b).[3] Counsel also argued that since the plan was a "non-qualified plan," it did not have to be funded. (Finding of Fact No. 32) Nevertheless, WSRC did not explain this aspect of a "non-qualified plan" to the Transferees in its June 28, 1993 memo. Rather, WSRC implied the Plan would be funded when it stated there would be a Trustee, Nations Bank, for the Delta Plan, that the Delta shortfall would be paid from that plan, and that the shortfall would be paid as a "monthly annuity" to be included in the Transferees' "normal pension check." In addition to not explaining what was meant by "non-qualified", WSRC also failed even to set up the Delta Plan which it had summarized in the June 28, 1993 memo. (*See, e.g.*, testimony of Mr. Greenquist, TT Vol II, p. 501.2 to p. 521.4.)

Since none of the promised action occurred, in violation of both ERISA and ordinary contract law, it was not error to create the equitable equivalent of a fund, reduce it to present worth, and award it to Plaintiff in a lump sum. Why should Plaintiff or the court have to rely on the future good faith or solvency of an entity that has deliberately

---

[3] Section 502(a)(1)(b) of ERISA, codified at 29 U.S.C. §1132(a)(1)(B), provides in pertinent part:

> (a) Persons empowered to bring a civil action.
>
> A civil action may be brought –
>
> (1) by a participant or beneficiary –
>
> . . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . .

disregarded its statutory and contractual obligations as WSRC has heretofore?

The Court has given Plaintiff the Delta Benefit WSRC described in the only plan document, the memo of June 28, 1993. WSRC did not expressly rule out a lump sum option in that "plan summary." It merely indicated that a monthly payment was contemplated, and stated that more details would be provided later. It never provided those details and its motive for that intentional failure was found to be a bad faith one.

6) IT WAS NOT ERROR TO GRANT PLAINTIFF'S MOTION TO ADD ATTORNEY'S FEES.

In our Order of November 25, 2003, we denied Defendant's Motion for Post-Trial Relief and we granted Plaintiff's Motion to Mold Verdict to add counsel fees in the amount of $72,642.50.

The provision of ERISA which allows for the award of attorney's fees may be found at §502(g)(1), which was codified at 29 U.S.C. §1132(g)(1), and provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." The statute "does not automatically mandate an award to a prevailing party." *Monkelis v. Mobay Chemical,* 827 F.2d 935, 936 (3d Cir. 1987), nor has the undersigned so interpreted it.

Courts in the Third Circuit have considered five factors in determining whether to make awards of attorney's fees:

(1) the offending parties' culpability or bad faith;

(2) the ability of the offending parties to satisfy an award of attorneys' fees;

(3) the deterrent effect of an award of attorneys' fees against the offending parties;

(4) the benefit conferred on members of the pension plan as a whole; and

(5) the relative merits of the parties' position.

Monkelis, 827 F.2d at 936, citing *Ursic v. Bethlehem Mines,* 719 F.2d 670, 673 (3d Cir. 1983).

At oral argument on Plaintiff's Motion to Mold Verdict, counsel for WSRC argued that the two most significant factors in this case were the first, regarding bad faith, and the fourth, whether a benefit would be conferred on members of the pension plan as a whole. WSRC argued that just because the verdict was against WSRC, it did not necessarily mean that WSRC had acted in bad faith. WSRC also argued that this litigation would not have an effect on other potential litigants, and that therefore attorneys fees should not be awarded.

WSRC also argued in the alternative that the *amount* of fees should be reduced. Specifically, counsel argued that the amounts of time expended by counsel in opposing the Summary Judgment Motions of Defendants should *not* be awarded, because those Motions resulted in Plaintiff's state law claims being dismissed by Judge Lucchino.

However, as Plaintiff argued, at the outset of the litigation Plaintiff had to bring all possible causes of action since it was difficult to know how to proceed at that stage given WSRC's non-compliance with ERISA and the formalities required of pension plans. It was only as the litigation proceeded that more information became available and the

causes of action could be whittled down. Also, as counsel for Plaintiff argued, this case could set a precedent for other Transferees similarly situated.

We awarded the full amount of counsel fees requested by Plaintiff based on all five factors, the most compelling being the bad faith of WSRC and the deterrent effect it is hoped the award will have on WSRC and others who might wish to avoid their pension obligations to their employees. Clearly, Plaintiff had no choice but to begin the case as it did.

The amount of the fee charged is very reasonable, especially in light of the preparation involved and time spent, all necessitated by the conduct of WSRC in fighting the claim to the bitter end despite the essential weakness of its defense. This is clearly a case where an award of counsel fees is appropriate and where they could also have been awarded under 42 Pa. C.S.A. §2503(9), regarding the award of counsel fees where a defense is pursued frivolously.

Most issues raised in the instant appeal also seem frivolous since the criticisms of the trial itself are based largely on disagreements as to credibility, a matter solely for the factfinder.

CONCLUSION

While not re-raising the issue for purposes of appeal, at argument on post-verdict motions, WSRC argued, correctly, that equitable principles apply to the issue of pension benefits under ERISA. One of those principles is that he who seeks equity must do equity. The concept is also covered by the phrase "unclean hands." Here, had

WSRC acted fairly towards Plaintiff instead of trying to deprive him of his vested right to the Delta Benefit, or had WSRC followed through with its stated intent to establish a non-qualified plan for the purpose of paying the Delta shortfall, we might be able to permit WSRC merely to restore a monthly annuity of $669. However, the conduct of WSRC on the delta issue has been virtually indifferent to the rights of the Transferees, except to the extent WSRC's own interests coincided with the Transferees' retirement demands.

At the time the Transferees were being asked to move to WSRC, WEC and WSRC promised "parity" between the WEC and the WSRC pension benefits. When it became apparent that it was possible that, in some cases, there would not be parity, WSRC promised to fix the problem in order to keep the Transferees happy. When the Transferees did not object to the solution described in the June 28, 1993 memo, WSRC quietly changed its mind and later failed to implement it. Furthermore, as the expected cost of roughly $360,000 for all Transferees became obviously too low, WSRC cobbled a new requirement of "retirement while at WSRC" that is inconsistent with the Delta Plan's basic purpose (to make up for the lost years of increasing *employer* contributions to WEC's pension plan because of an employee's service at WSRC) and is also inconsistent with the concept of a *vested* benefit. Lastly, there are no plan documents which might assist us in reaching a different conclusion because WSRC declined to adopt them

in violation of its duties under ERISA.[4] Equity requires the result reached by the Court

Furthermore, the evidentiary bases for most of the Court's Findings of Fact have not been questioned at all on appeal. The few findings that have been questioned are amply supported by the record. The only legal conclusions questioned on appeal are whether counsel fees were warranted and whether Plaintiff should receive only an award of a monthly annuity rather than the lump sum the Court felt appropriate.

The verdict and the award of counsel fees are amply supported by the evidence. The judgment of this Court should be affirmed.

By the Court

/s/ Friedman, J.

DATED: April 26, 2004

[4] WSRC essentially admitted its ERISA violations but added the irrelevant albeit uncontested point that they are only a reason for fines and do not give rise to a private cause of action. WSRC ignored the fact that illegal activity, even if not directly actionable privately, is still relevant to the issue of unclean hands.

APPENDIX F

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

STEPHEN D. HOLLINGSWORTH, Respondent v. WESTINGHOUSE SAVANNAH RIVER CORPORATION, Petitioner	:	No. 223 WAL 2005 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 18th day of May 2006, the Emergency Motion for the Immediate Consideration of the Appellant's Petition for Allowance of Appeal is dismissed as moot. The Petition for Allowance of Appeal is denied.

(2)

No. 06-243

Supreme Court, U.S.
FILED
AUG 29 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

WASHINGTON SAVANNAH RIVER COMPANY,

Petitioner,

v.

STEPHEN D. HOLLINGSWORTH,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Was the Pennsylvania state court correct in concluding that it had jurisdiction over Petitioner Westinghouse Savannah River Company ("WSRC")[1], where (1) WSRC's parent company – Westinghouse Electric Corporation ("WEC") – was always headquartered in Pennsylvania and had many operations and employees there, (2) WSRC was a wholly owned subsidiary of WEC (with the two companies being so interrelated that they were alter egos of one another), (3) where WSRC and WEC acted together in convincing Respondent Hollingsworth and many other Pennsylvania-based residents to transfer to WSRC facilities in South Carolina, and (4) where the promises made regarding the transfer gave rise to Hollingsworth's cause of action in the Pennsylvania court?

[1] Seven months ago (in December 2005), WSRC changed its name from Westinghouse Savannah River Company to Washington Savannah River Company.

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INTRODUCTION AND SUMMARY OF ARGUMENT

In 1999, Respondent Stephen D. Hollingsworth ("Hollingsworth") filed his complaint against Petitioner Westinghouse Savannah River Company ("WSRC") alleging that he had earned retirement benefits in exchange for years of service in connection with nuclear energy operations first owned by Westinghouse Electric Corporation ("WEC"), and later by WSRC – a wholly owned WEC subsidiary. Hollingsworth further alleged that, in order to induce him to transfer from WEC to WSRC, he was promised that he would not lose any pension benefits. In fact, WSRC established an informal pension plan to pay for any loss or difference in pension benefits he might suffer as a result of the transfer – the loss or difference being referred to as the "Delta." However, when Delta pension benefits were due and owing, WSRC refused to award them to Hollingsworth. In denying benefits, WSRC claimed that one "condition" of receiving them was that the retiree must have retired *directly* from WSRC at retirement age. So any person laid off or otherwise leaving WSRC prior to retirement age was deemed to be ineligible – even if that person had decades of service, received pensions from WEC and WSRC, and received a substantially inferior combined pension than he or she would have received had there been no transfer to WSRC.

After an extensive trial, Judge Judith Friedman of the Pennsylvania state court found that this alleged "condition" was never part of the agreement to pay Delta benefits, that WSRC's refusal to pay Delta benefits clearly violated the agreement, and that – indeed – WSRC acted in bad faith in later concocting the "condition." The intermediate appellate court in Pennsylvania unanimously

affirmed in an unpublished decision, and the Pennsylvania Supreme Court denied review on May 18, 2006.

In its Petition for Writ of Certiorari ("Pet."), WSRC now seeks to have this Court review the state court decisions. WSRC contends that it lacked the requisite contacts with Pennsylvania for the courts there to have asserted jurisdiction over it. This Court should deny the Petition. As the appellate court in Pennsylvania found, "(1) WSRC purposefully directed business activities toward residents of Pennsylvania and could reasonably anticipate being haled into court here; and (2) the nature and quality of WSRC's contacts with Pennsylvania were such as to 'make it reasonable and fair' to require WSRC to conduct its defense of Hollingsworth's Complaint in Pennsylvania." Pet. A-14 to A-15.

COUNTER-STATEMENT OF THE CASE

A. Hollingsworth's Work History Through 1989, And WEC's Creation Of WSRC As Its Wholly Owned Subsidiary.

From August 15, 1973 to August 1, 1989, Hollingsworth was an employee of Westinghouse Electric Company ("WEC"), *a Pennsylvania corporation with headquarters in Western Pennsylvania*. Reproduced Record on appeal below ("RR") 563a-564a, and 159a; Pet. A-1, A-11. WEC first employed Hollingsworth as a Nuclear Engineer to design reactor protection systems and to perform computer simulations of reactor plants under accident conditions. WEC later placed him in charge of licensing technologies to other countries. RR 563a-564a, and 159a.

In 1988, the Department of Energy (hereinafter referred to as "DOE") sought new management for its Savannah River site, a 200-square-mile South Carolina manufacturing facility built in the early 1950s to generate plutonium and tritium for nuclear weapons. RR 570a-571a. WEC sought to manage the site, and an important reason behind its decision to seek the contract was to keep its nuclear reactor design and construction personnel intact. It did not want to lose these valuable Pennsylvania-based personnel to other firms during this period of decreased demand for services related to the nuclear reactor industry. RR 160a, Pet. E-5. WEC successfully bid, and assumed management of the site from DuPont in 1989. *Id.*, and RR 572a-573a. The entity WEC created to perform under the contract was a subsidiary known as Westinghouse Savannah River Company ("WSRC"). WSRC was *wholly* owned by WEC until it was divested at the end of March 1999 (RR 106a, ¶ 4, Pet. E-4) – which was just months before Hollingsworth filed his lawsuit and *after* all the pertinent misconduct directed against Hollingsworth had already taken place.

In the proceedings below, in countering WSRC's argument that it had insufficient contacts with Pennsylvania to be sued there, Stephen Hollingsworth filed a sixteen-page sworn affidavit, to which he attached thirty-seven (37) exhibits. This evidence shows a direct and substantial relationship between WEC and WSRC, between WSRC and Western Pennsylvania, and between the breach of promise at issue and Western Pennsylvania. Just a few of the highlights of the affidavit and exhibits are the following:

- A staff of approximately 20 WEC employees was established at Waltz Mill and the Energy

Center (both of which were WEC facilities in Western Pennsylvania) to bid the contract for the Savannah River project. RR 170a ¶ 43. Ambrose Schwallie, a WEC manager, was responsible for bid preparation. He maintained offices and used personnel at WEC's Waltz Mill facility. Two individuals, Mr. Moore and Mr. Gallagher, who were located at WEC's Monroeville Energy Center in Pennsylvania, assisted in the bid and became, along with Schwallie, part of WSRC's management team. RR 73a-74a. (Years later, Moore and Gallagher transferred back to WEC.)

- Many WEC employees from the Pittsburgh, Pennsylvania, area were ultimately transferred to manage the Savannah River Plant, and WEC felt that it benefited by staffing WSRC with these highly skilled personnel. RR 169a. RR 75a-76a. In the end, management for the WSRC site was taken almost entirely from the management ranks at WEC in Pittsburgh. See examples at RR 169a ¶¶ 13-19; RR 184a-185a. So connected to Pittsburgh were these transferees that many kept season tickets for the Steelers and even rigged a satellite receiver to view Steeler games in South Carolina. RR 170a ¶¶ 52 and 51.

- The profits from WSRC flowed to the WEC balance sheet, and WSRC received management guidance and directives from WEC. RR 168a-169a, ¶¶ 2-3, and Ex.36.

- WEC senior managers served on WSRC's board of directors. RR 169a ¶ 8.

- WSRC employees participated in WEC programs such as the employee stock purchase plan that provided the opportunity for WSRC employees to purchase WEC stock at a discounted value.

- WEC management in Pittsburgh set financial and non-financial objectives of WSRC. RR 170a ¶ 28; RR 309a-314a.

- Service at WEC counted towards a WSRC pension and vice versa. WSRC employees received WEC service awards. RR 170a ¶¶ 30-31.

- WSRC employees attended courses in Pittsburgh and elsewhere – courses that WEC had established. RR 170a ¶ 32.

- WSRC and WEC Human Resources Departments actively communicated to facilitate Hollingsworth's transfer back to the Energy Center at WEC (discussed below). RR 170a ¶ 34; RR 248a-267a.

- Former WEC employees whose jobs were eliminated during the WSRC downsizing had their resumes circulated throughout the Westinghouse Electric Corporation companies to aid them in the search for other jobs. RR 170a ¶ 39.

- As discussed below, Hollingsworth was for a time during 1995 on "loan" from WSRC to WEC in the form of an "interworks requisition" ("IWR"), an internal WEC procedure. RR 86a-87a. The loan was for the purpose of permitting Hollingsworth to work on a five-billion dollar WEC project related to a Taiwan Nuclear power plant. RR 88a. An IWR could only be used to transfer employees from one WEC department to another, not between separate corporations. RR 88a-89a. WSRC paid for Mr. Hollingsworth's salary during his 1985 IWR with WEC. RR 91a.

See also discussion of these facts by Pennsylvania Superior Court, pp. A-11 to A-13 of Petition.

B. Hollingsworth Is Induced To Transfer To WSRC.

Starting in 1988, WEC encouraged numerous WEC employees to transfer to WSRC. Knowing that the employees were concerned whether the transfer would cause them to lose valuable retirement benefits, WEC promised that employees who transferred to WSRC would not suffer a loss in such benefits. Thus, WEC (and WSRC) represented that, if employees accepted transfers, the money paid to them in retirement would be no less than the amount paid if they were to continue to work for WEC. RR 163a ¶¶ 62-65; RR 576a lines 5-15. These promises and representations were subsequently confirmed by WEC's and WSRC's course of conduct (as discussed below). During 1989, over four hundred (400) WEC engineers, scientists and managers, transferred to the Savannah River site. RR 161a ¶¶ 27-28. As noted, they worked for the newly formed and wholly owned subsidiary, WSRC. *Id.*

The offer to Hollingsworth was formally made on June 23, 1989, and he accepted the offer and transferred on August 1, 1989. RR 16263a ¶¶ 55, 58. Hollingsworth's education, his experience training naval officers and enlisted men in the design and operation of nuclear propulsion plants, and his experience in design and analysis of commercial nuclear plants, ideally suited him for a position at WSRC. RR 162a ¶ 45. WEC characterized Hollingsworth's acceptance of a position with WSRC as an "internal transfer". RR 163a ¶¶ 59-60. Prior to WSRC's offer and transfer of Hollingsworth, WEC represented to Hollingsworth (as it had to the other transferees) that – upon retiring – his pension benefits at WSRC would be the same as if he had retired from WEC. RR 163a ¶¶ 62-65; RR 576a lines 5-15. This representation led Hollingsworth to accept, even though it was a hardship for him to leave

behind in Pennsylvania his wife and high school age son. RR 574a-575a.

An employment consultant had informed Hollingsworth that he could have commanded more money outside WEC; but he wanted the pension benefits provided by continued WEC employment. RR 162a ¶¶ 50-53.

Shortly after Hollingsworth's transfer on August 1, 1989, Michelle Trill of WSRC represented to Hollingsworth that the benefits package that WSRC had negotiated with DOE was in all cases equal to or better than the benefits package enjoyed by WEC employees. RR 163a ¶¶ 65 and 58, 579a.

C. Establishment Of The Delta Plan And Representations To Hollingsworth And Others.

During 1992, WEC and WSRC disclosed to Hollingsworth and other transferred employees that, due to an oversight, WSRC pensions would be less than the pensions that they and the other transferred employees would have received had they remained at WEC. RR 582a-585a, and Hollingsworth Deposition, page 26, lines 17-20, page 27, lines 16-18. The shortfall or difference between the two pensions was termed the pension "Delta." RR 164a ¶ 77. WSRC acknowledged in a memo: "Many of these employees would have not transferred had they known the problem, which would have been a loss for both of us." RR 585a. During 1992 and 1993, WSRC and its consultants (Buck Consulting from Pittsburgh) studied the problem extensively (e.g., RR 586a-605a). WSRC ultimately assured Hollingsworth and the other transferees that the WSRC pension "Delta" problem would be corrected, and that Hollingsworth and the others would indeed receive

the same pensions that they would have received had they continued to work directly for WEC. These representations were most emphatically communicated to transferred employees in an Inter-Office Memorandum dated June 28, 1993, from Paul W. Matthews (hereinafter "Matthews Memorandum"), who held the title of Manager of WSRC's Employee Benefits and Systems. RR 163a-164a, ¶¶ 66 and 77.

Under the Matthews Memorandum, transferred employees (such as Hollingsworth) were guaranteed to receive the pension shortfall or Delta, and a detailed example specified how the Delta would be calculated. RR 1100a-1101a; Pet. E-7 to E-8. The Matthews Memorandum specified that Delta benefits would be paid to those employees transferring to WSRC through June 1991, so long as the size of "Delta" was at least $25.00 per month. RR 1101a.

When it issued the Matthews Memorandum, WSRC never told employees or others that it should be interpreted as imposing a very restrictive condition on receipt of Delta benefits, namely, that the employee would have to retire *directly* from WSRC to be eligible. RR 611a-612a; RR 627a-629a. Indeed, upon reading it, Hollingsworth himself did not view it as imposing such a condition, and he considered it irrelevant whether or not he remained an active WSRC employee right up until retirement. RR 625a.

D. Hollingsworth's Transfer Back to Pennsylvania.

In May 1995, WEC requested that WSRC transfer Hollingsworth on an "Inter Works Requisition" ("IWR") *back to Pennsylvania*, so that he could work with WEC's Industries and Technologies Group. The transfer was

granted. RR 165a ¶¶ 92-94; Pet. E-9. For Hollingsworth, this became a permanent assignment as of August 25, 1995. RR 639a-645a; RR 166a ¶¶ 98-99.

At the time of his transfer back to WEC, WSRC did not inform Hollingsworth that the IWR or the subsequent permanent employment by WEC would cause him to become ineligible for the Delta benefits. Indeed, at the time, Mr. Matthews himself advised Hollingsworth that his transfer "would not have any impact on" Hollingsworth's Delta entitlement. RR 646a-648a; RR 677a-678a; RR 166a ¶ 97.

E. Hollingsworth's Retirement, WSRC's Confusing And Conflicting Determinations Concerning Honoring The Promise To Pay Hollingsworth The "Delta" Benefits, And The Ultimate Denial Of Benefits In September 1999.

WEC's Industries and Technologies Group, where Hollingsworth worked during the second half of 1995, offered an Immediate Special Retirement Pension as part of a major downsizing of personnel in the fall of 1996. RR 166a ¶ 101, and 652a-653a. On November 30, 1996, Hollingsworth retired from WEC as part of this downsizing, and he began drawing WEC pension benefits. RR 167a ¶ 111, and 652a-653a; Pet. E-9.

At that same time, Hollingsworth was also entitled to "retire" from WSRC, and he therefore requested payment of WSRC pension benefits. RR 654a-658a, 673a-674a. In response to the request, WSRC calculated the value of Hollingsworth's pension benefits, *including the Delta* (which Hollingsworth believed to be applicable since he was "retiring" and his combined WEC and WSRC benefits

were less than his benefits would have been had he never transferred to WSRC). *Id.* By letter dated January 24, 1997, Harry L. Fuller, of WSRC, provided a detailed description of Hollingsworth's pension benefits, including a Delta payment of $609.00 per month. RR 658a-659a, and 167a.

Hollingsworth later contacted Mr. Fuller and also Buck Consultants of Pittsburgh (who worked for WSRC) to protest the calculation of the Delta amount, informing both that it should be increased by $60.00 per month. RR 663a, and RR 167a; Pet. E-10.

Hollingsworth's inquiry led WSRC to re-evaluate the determination, and then to conclude that he should be paid *no Delta whatsoever*. Pet. E-10. The basis for the denial of benefits was WSRC's belated assertion that one "condition" for receiving Delta benefits was that the employee had to retire directly from WRSC, and not WEC. RR 666a. Never before had anyone from WSRC made this assertion. *Id.*, and RR 676a.

Hollingsworth later sent various letters of protest, and after much delay, his claim for the Delta benefits was finally denied in September 1999, and he has never been paid these benefits.

F. Procedural History.

On November 16, 1999, two months after the final denial, Hollingsworth filed his lawsuit against WSRC and WEC, setting forth causes of action that included breach of contract to provide pension benefits. RR 11a-15a. WSRC sought dismissal or transfer, arguing that the Court lacked jurisdiction over WSRC, allegedly because of

WSRC's limited contacts with Pennsylvania. RR 18a. Hollingsworth responded to the jurisdictional argument, demonstrating that WSRC was a wholly owned and controlled subsidiary of WEC (a Pennsylvania corporation), that WSRC had extensive and continuing contacts with Pennsylvania, and that the subject matter of this case arose from acts which occurred in Pennsylvania. RR 143a-172a. Agreeing with Hollingsworth, Judge Lutty of the Court of Common Pleas in Pittsburgh found that the Pennsylvania court had jurisdiction to hear the dispute. Pet. D-1 to D-2.

In July 2001, WEC and WSRC filed motions for summary judgment, arguing, *inter alia*, that Hollingsworth was really seeking benefits under a "plan" maintained pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001, et seq., and that his claims were therefore preempted by ERISA.[2] RR 362a-363a.

In response to WSRC's argument that the action was really an ERISA action, Hollingsworth contended that WSRC had never met the formal requirements for establishing and maintaining an ERISA plan, and that if the pension Delta were in fact such Plan, then WSRC had committed flagrant violations of many of ERISA's reporting and disclosure requirements. RR 398a-400a. WSRC responded that it did not need to comply with these laws in order to win a preemption argument: it said a non-compliant, illegal plan

[2] WEC also moved to dismiss itself contending that *WSRC* as ERISA plan sponsor (and not WEC) was responsible for obligations under the Delta Plan. The Court did ultimately dismiss WEC from the suit, but did not provide any reasoning for its dismissal order. RR 425a.

is still an ERISA plan affording the defendant the protection of preemption.

As an alternative argument in opposing the motion, Hollingsworth contended that the case should be *treated* as an ERISA claim, as state courts have concurrent jurisdiction over claims for benefits under ERISA plans. RR 406a-407a. This argument was based on statutory language and precedent holding that, if a program that is the subject of a state lawsuit is in fact an ERISA plan, then the state court judge should still try the matter as a claim for "plan benefits" brought under 29 U.S.C. § 1132(a)(1)(B). This is because state courts have concurrent jurisdiction to hear such claims. 29 U.S.C. § 1132(e)(1). Where such state claims are "treated" as ERISA claims, the court has authority to award full benefits to plaintiff.

On February 15, 2002, while finding that all state law claims were preempted by ERISA (thus granting part of WSRC's motion), state court Judge Lucchino agreed with Hollingsworth's alternative argument, finding that his lawsuit – since it sought pension benefits – stated a claim under ERISA, 29 U.S.C. § 1132(a)(1)(B). Thus, Judge Lucchino declared that "this action shall proceed as a claim under ERISA against [WSRC] by virtue of this Court's jurisdiction under 29 U.S.C. § 1132(a)(1)(B) and 1132(e)(1)." RR 425a-426a.[3]

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[3] Later, in clarifying his decision, Judge Lucchino stated: "[W]hen a pleading states a claim that is completely preempted (such as the type of ERISA claim at issue in this case), it matters not whether the federal action is pled on 'the face of the complaint': a potential federal cause of action exists" (RR 1829a); and "this Court decided that ERISA preemption applied to Plaintiff's claims and that Plaintiff's complaint,

(Continued on following page)

The case was then assigned to yet another judge – Judge Friedman – who agreed that the complaint should be treated as an ERISA claim from its inception, and who allowed the case to proceed to trial as an ERISA action for pension benefits. Judge Friedman heard two days of testimony, observing the demeanor of multiple witnesses and scrutinizing both testimonial and documentary evidence. On June 17, 2003, Judge Friedman issued her Memorandum in Support of Verdict. On the merits, she found that the Matthews Memorandum, the primary document governing the terms of the Delta Plan, did not contain the alleged "condition" that WSRC said made Hollingsworth ineligible: there was no requirement that he retire *directly* from WSRC. Later, on April 26, 2004, Judge Friedman issued a supplemental 41-page opinion, reiterating that certain key WSRC witnesses (e.g., Matthews) were "not credible" (e.g., Pet. E-17), and noting that WSRC's "fingers were undoubtedly crossed" (Pet. E-19), and that WSRC had acted in "bad faith" (Pet. E-33) and

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although it did not refer to ERISA, pled sufficient facts to state a claim under ERISA" (RR 1830a), and "Plaintiff pled (even if unintentionally) sufficient facts to state a claim under ERISA in his original complaint." RR 1831a.

In the meantime, even before Judge Lucchino had issued his decision ordering the case to trial as an ERISA claim, WSRC tried another maneuver: It removed the entire proceeding to federal court even though federal law requires such removal within 30 days of the filing of the complaint (28 U.S.C. § 1441), and even though WSRC had waited over two years to remove. In federal court, WSRC said it did not really "know" Hollingsworth was bringing an ERISA claim until Hollingsworth made the alternative argument in opposing summary judgment in late 2001. Judge D. Brooks Smith, then Chief Judge in federal court (and now sitting on Third Circuit Court of Appeals), rejected this argument, and remanded the case to state court. RR 1830a-1831a.

shown "indifference" to the rights of Hollingsworth and other transferees (Pet. E-36). Carefully examining the record, she again rejected WSRC's "tortured reading" of the Matthews Memorandum as "contrary to English grammar and to its own usage at the time the promise was made." Pet. E-19.

The intermediate appellate court in Pennsylvania unanimously affirmed in an unpublished decision (Pet. A-1), and the Pennsylvania Supreme Court exercised its discretion to deny review without decision on May 18, 2006. Pet. F-1.

REASONS FOR DENYING REVIEW

A. The Pennsylvania Courts Correctly Asserted Jurisdiction.

Pennsylvania courts may exercise two types of personal jurisdiction over a non-resident corporate defendant: 1) specific jurisdiction, based upon the specific acts of the defendant giving rise to the cause of action (42 Pa. Cons. Stat. § 5322(a)); or 2) general jurisdiction, based upon the defendant's general activity within the Commonwealth. See 42 Pa. Cons. Stat. § 5322(b); *Kubik v. Letteri*, 532 Pa.10, 16-17, 614 A.2d 1110, 1113-14 (1992).

One special application of these principles is that a Pennsylvania court may assert personal jurisdiction over a *non-resident* corporation (such as WSRC) if plaintiff shows that the defendant is the "alter ego" of a *Pennsylvania* corporation (such as WEC). See *Botwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 72, 213 A.2d 349, 354 (1965) (concluding subsidiary is "alter ego" of parent since domination and control by parent corporation renders

subsidiary a mere instrumentality of parent); see also *Williams v. Rose*, 170 A.2d 577, 403 Pa. 619 (1961) (Delaware corporation was found to be "doing business" in Pennsylvania so as to be amenable to service in Pennsylvania, where Delaware corporation owned all stock of Pennsylvania corporation, which had done business in Pennsylvania until it moved out, and corporations formed one conglomerate, with Pennsylvania corporation alter ego of Delaware corporation); *United Steelworkers of America v. Copperweld Steel Co.*, 230 F. Supp. 383 (W.D. Pa.1964).

Judge Lutty applied this rule in this case. After reviewing the parties' briefs, hearing oral argument, and considering relevant case law, he found that WSRC was an "alter ego" of WEC, and that jurisdiction over WSRC was properly asserted. Pet. D-2.

The ruling is correct, as there was substantial evidence that WSRC was an "instrumentality" or mere "alter ego" of WEC. In particular, Hollingsworth compiled a list of fifty-two (52) direct connections between WSRC and WEC, clearly demonstrating not only that WSRC maintained significant contacts with Pennsylvania but that WEC completely dominated and controlled WSRC for its own benefit. Among them was the fact that WSRC obtained almost all of its essential employees through transfers from WEC's facilities in Pittsburgh, and that WEC benefited from the creation and staffing of WSRC by keeping its top nuclear experts from seeking employment with companies that were not under its control.

Many of these same facts show that, even apart from the "alter ego" issue, Judge Lutty's assumption of jurisdiction can be upheld on other grounds. In other words, even if WSRC was *not* an "alter ego" of WEC, specific *activities*

it performed which gave rise to the cause of action (e.g., its inducement of Pennsylvania employees to transfer, its representations concerning pensions, and it reneging on its promise just because Hollingsworth had returned to Pennsylvania to work with WEC at the end of his career) justified the Court below assuming jurisdiction. 42 Pa. Cons. Stat. § 5322(a) (listing examples of such activities, such as "(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth. (2) Contracting to supply services or things in this Commonwealth. (3) Causing harm or tortious injury by an act or omission in this Commonwealth. (4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth."). *E.g., Skinner v. Flymo, Inc.*, 351 Pa.Super. 234, 239, 505 A.2d 616, 619 (1986) (jurisdiction proper if plaintiff's cause of action "arise[s] out of the defendant's *activities* within the Commonwealth . . . ").

Judge Lutty's ruling did not violate the Fourteenth Amendment of the U.S. Constitution (as WSRC now contends). Indeed, the ruling can even be upheld on the alternative grounds that WSRC had sufficient "minimum contacts" with Pennsylvania to make the exercise of jurisdiction permissible under the U.S. Constitution: "Jurisdiction of the Pennsylvania courts may be exercised with respect to all persons, including corporations, 'to the fullest extent allowed under the Constitution of the United States.' 42 Pa.C.S. § 5322(b)." *Slota v. Moorings, Ltd.*, 343 Pa. Super. 96, 101, 494 A.2d 1, 3 (1985). As a Pennsylvania appellate court aptly noted (citing many decisions of the U.S. Supreme Court):

"The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has 'certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken v. Meyer*, 311 U.S. 457, 463 [61 S.Ct. 339, 342, 85 L.Ed. 278 (1940)].'" *Calder v. Jones*, 465 U.S. 783, 787, 104 S.Ct. 1482, 1486, 79 L.Ed.2d 804, 810 (1984) quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945). Consistent with this principle "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174, 2183, 85 L.Ed.2d 528, 542, (1985). Furthermore, as to contractual obligations, "parties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *Burger King Corp. v. Rudzewicz*, *supra*, 471 U.S. at 473, 105 S.Ct. at 2182, 85 L.Ed.2d at 540, quoting *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950). See also *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223, 78 S.Ct. 199, 200-201, 2 L.Ed.2d 223 (1957).

Critical to due process analysis "is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490, 501

(1980). Indeed, even a single act can support jurisdiction. *McGee v. International Life Insurance Co., supra*, 355 U.S. at 223, 78 S.Ct. at 201, 2 L.Ed.2d at 223.

* * *

With these principles in mind, the facts of the instant case must be examined. The trial court found that "the only evidence of defendant's business conduct in Pennsylvania were some incidental phone calls made by Mr. Menin while he was in Montgomery County on unrelated business". (Trial Court Opinion at 4). The trial court also indicated, "(d)efendant certainly took no action by which it purposefully availed itself of the benefits and protections of Pennsylvania law; defendant's activities within the state being incidental at best." (Trial Court Opinion at 4-5). This reasoning overlooks substantial record evidence which as previously stated must be viewed in the light most favorable to Eastern.

The complaint as noted seeks recovery for various materials and services specified in a series of invoices. This is not a situation wherein a plaintiff is seeking to establish jurisdiction on the basis of a defendant's "random", "fortuitous", or "attenuated" contacts. See *Burger King Corporation v. Rudzewicz, supra*, 471 U.S. at 475, 105 S.Ct. at 2183, 85 L.Ed.2d at 541; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774, 104 S.Ct. 1473, 1478, 79 L.Ed.2d 790, 797 (1984); *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S. at 299, 100 S.Ct. at 568, 62 L.Ed.2d at 502. This is a suit alleged to arise out of and relate to the defendant's contacts within the Commonwealth. Island [the foreign corporation] is alleged to have deliberately reached out beyond the Virgin

> Islands and negotiated with a Pennsylvania Corporation for the purchase of various materials and services. Refusal to make the contractually required payments in the Commonwealth caused forseeable injuries to [plaintiff] Eastern which at least makes it presumptively reasonable for Island to be called to account in the Commonwealth of Pennsylvania for such injuries. See *Burger King Corp. v. Rudzewicz, supra*, 471 U.S. at 480, 105 S.Ct. at 2186, 85 L.Ed.2d at 545.

Eastern Continuous Forms v. Island Business Forms, 355 Pa. Super. 352, 355-57, 513 A. 2d 466, 468-69 (1986).

Here, as shown by the recitation of facts above, WSRC's had certain "minimum contacts" with Pennsylvania such that allowing the suit to proceed "does not offend 'traditional notions of fair play and substantial justice.'" *Id.* Given its inducement of 400 Pennsylvanians to move to South Carolina, and its promise to integrate pensions with those of its Pennsylvania parent, it clearly "reach[ed] out beyond one state and create[d] continuing relationships and obligations with citizens of another state," making it "subject to regulation and sanctions in the other State for the consequences of [its] activities." *Eastern Continuous*, 355 Pa. Super. at 355-57, citing *Burger King Corp. v. Rudzewicz, supra*, 471 U.S. at 473, 105 S.Ct. at 2182, 85 L.Ed.2d at 540, quoting *Travelers Health Assn. v. Virginia*, 339 U.S. 643, 647, 70 S.Ct. 927, 929, 94 L.Ed. 1154 (1950). See also *McGee v. International Life Insurance Co.*, 355 U.S. 220, 222-223, 78 S.Ct. 199, 200-201, 2 L.Ed.2d 223 (1957).

Accordingly, the appellate court below correctly concluded:

> (1) WSRC purposefully directed business activities toward residents of Pennsylvania and could reasonably anticipate being haled into court here; and (2) the nature and quality of WSRC's contacts with Pennsylvania were such as to 'make it reasonable and fair' to require WSRC to conduct its defense of Hollingsworth's Complaint in Pennsylvania.

Pet. A-14 to A-15. This passage shows, that contrary to WSRC's suggestion at p. 11 of its Petition, the state appellate court *did* find record evidence to support "specific" personal jurisdiction, and not simply "general" jurisdiction: It was WSRC's "purposeful" business activities directed to Pennsylvania residents (e.g., its recruiting practices) that made it reasonable to anticipate that it could be "haled into court" in Pennsylvania. Moreover, WSRC's connection with Buck Consultants of Pittsburgh further shows the necessary nexus to justify asserting jurisdiction, since (1) Buck was a fiduciary, (2) Buck was under direct contract with WSRC regarding this very pension issue, and (3) Buck did its work and calculations in this case in Pittsburgh. These are among the facts that established personal jurisdiction over WSRC independently of WEC and without resorting to "minimum contacts" analysis.

Even apart from its specific "purposeful" activities that serve as a basis of jurisdiction, WSRC's relationship with WEC – its Pennsylvania parent corporation – does in fact justify the lower court decisions. WSRC cites several cases for the proposition that "distinct corporate identities" should be respected, and that the "presence of one in the forum state may not be attributed to the other." Pet. E-12 to E-16, citing *Cannon Manufacturing v. Cudahy Packing*, 267 U.S. 333, 335-36 (1925), *Mylan*

Laboratories v. Akzo, 2 F.3d 56, 62 (4th Cir. 1993), *DeCastro v. Sanfill, Inc.*, 198 F.3d 282, 285 (1st Cir. 1999), and *United States v. Bestfoods, Inc.*, 524 U.S. 51, 61 (1998). However, these cases are all distinguishable. There was ample evidence here that WEC dominated and controlled WSRC, and that it was an alter ego of WEC. See facts set forth at pp. 3 to 5 above and Pet. A-11 to A-13. None of the cases that WSRC cites involved evidence in which parent and subsidiary were as intertwined as WEC and WSRC. In any event, the Pennsylvania courts – after considering the documentary and testimonial evidence – found the two companies to be sufficiently intertwined; these findings of fact are not clearly erroneous; and such fact-intensive legal proceedings are not the type that warrant review by this Court through a petition for writ of certiorari.[4]

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[4] Pennsylvania's intermediate appellate court – and not its highest court – issued the decision below. This fact – as well as the fact that the decision was unpublished – weigh in favor of denying the Petition. Supreme Court Rule 10(b) provides that a reason to grant a petition for writ of certiorari is that a state court *of last resort* has decided a federal question in a way that conflicts with a decision of another state court of last resort or of a United States Court of Appeals. Disfavoring review of decisions by state *intermediate* appellate courts makes sense, since such decisions are less likely to be considered outside of the jurisdiction, and they can also be corrected later by the state court of last resort.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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